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Personal Liability of Government Legal Personnel in Malpractice Actions: Avoiding a Legal Malpractice Crisis in the Military

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I. Introduction

The legal malpractice crisis may soon see the exposure of military legal personnel to personal liability for negligence. Thus far, the misrepresentation exception of the Federal Tort Claims Act has barred recovery for erroneous legal *advice* rendered in the course of duty. However, in *Matthews v. United States*,[1] the Fifth Circuit Court of Appeals indicated that in the case of military attorneys who negligently render legal *services*, the misrepresentation exception may not bar malpractice actions.

At the present time there is no legislation which makes the provisions of the Federal Tort Claims Act a remedy exclusive of any other civil action or proceeding. Additionally, in the event military personnel are sued individually, no provision exists for indemnification or substitution of the United States as a defendant.

Yet these very protective measures have been enacted for the benefit of government medical personnel in many areas.

The purpose of this article is to examine the applicability of the misrepresentation exception of the Federal Tort Claims Act and the Feres doctrine to legal malpractice actions against military legal personnel. Next, the military lawyer's current individual exposure to liability will be evaluated. Legislation which has been enacted for the protection of government medical personnel who are defendants in malpractice actions will be explored and compared with proposed legislation for the protection of military legal personnel. Finally, the legislation proposed by the American Bar Association Standing Committee on Legal Assistance for Military Personnel will be endorsed as an effective and comprehensive method of avoiding a legal malpractice crisis in the military.

II. The Applicability of the Feres Doctrine to Legal Malpractice Actions

In the case of *Feres v. United States*,[2] the United States Supreme Court held that the "[g]overnment is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service."[3]

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that act as excluding claims of that character.[4]

The Feres doctrine has been followed by the courts and is firmly established today.[5]

The doctrine also grants members of the military service immunity from suits brought by fellow members of the military service for service connected injuries caused by their negligent acts, whether ministerial or discretionary, performed in the line of duty.[6] However, the doctrine does not provide immunity in suits brought by military dependents and retired military personnel; two substantial groups. Thus, it is unwise to place much reliance on the Feres doctrine as an all encompassing immunity in military malpractice actions.

III. Judicial Interpretation of the Exception to the Federal Tort Claims Act in Legal Malpractice Cases

In *Matthews v. United States*,[7] the Fifth Circuit Court of Appeals refused to decide

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whether an action against the United States arising from legal malpractice of United States Air Force personnel was barred by the misrepresentation exception to the Federal Tort Claims Act.[8] Citing *United States v. Neustadt*,[9] the court observed that breach of the "duty of due care in obtaining and communicating information upon which a party may reasonably be expected to rely in the conduct of his economic affairs" is the "traditional and commonly understood definition of negligent misrepresentation." [10]

However, the court also stated:

> We wish to make it clear that we make no decision on the merits. We only hold that under the notice pleadings rule and the cases cited herein the Matthewses could conceivably establish facts and circumstances which permit recovery. Of course, it is also possible that upon a development of the facts their claim may be found to be barred by § 2680 (h). At this time we are not informed of all the circumstances under which the legal advice was sought or given, *e.g.*, whether military personnel on active duty at the Air Force base in question were specifically instructed or encouraged to present such claims to base legal personnel, whether legal personnel had been instructed to complete and file administrative claims or to thoroughly assist persons seeking help in obtaining competent legal aid.[11]

In medical malpractice cases, a communicated diagnosis with nothing more comes within the misrepresentation exception; thus the suit against the government is barred.[12] But when the physician is under a duty to treat the patient, as well as communicate the diagnosis, the malpractice action is not barred by the misrepresentation exception.[13]

Some legal malpractice cases fall within the misrepresentation exception and would be barred by the Federal Tort Claims Act. For example, a military attorney may render erroneous legal advice. On the other hand, it is possible to conceive of a situation in which the military attorney would be responsible for communicating legal advice to a serviceman, such as the period in which to file an administrative claim, and also for rendering the legal service, such as filing the claim on behalf of the serviceman. According to the *Matthews* dicta, if the negligent acts or omissions of the attorney bar the suit because the attorney fails to *file* the claim within the time limit prescribed by the Administrative Procedures Act, the action against the United States may not be barred by the misrepresentation exception.

In *Woodward v. United States*[14] plaintiffs were injured when a truck driven by an employee of the Town of Bishop struck their car. Subsequently, Mr. Woodward consulted a United States Air Force attorney. Although the attorney advised him that he would have to contact a private attorney if he wished to file a tort action against the town, he incorrectly informed him that he had two years within which to file the action. As a result, the administrative claim was not timely filed and the Woodward's suit was barred.

The United States District Court for the Eastern District of Illinois held that, although the Woodward complaint was for negligent breach of duty, the complaint actually stated a claim for misrepresentation. Additionally, the facts did not come within the only exception recognized by the Seventh Circuit which permits claims based on misrepresentation only when government employees make false representations while carrying out clearly delegated, nondiscretionary duties. Thus, whether a claim is barred by the misrepresentation exception will probably depend on the facts of the case.

IV. Personal Liability of Government Law Personnel

There is nothing in the Federal Tort Claims Act which provides that it is the exclusive remedy[15] in legal malpractice cases. If a malpractice action against a government attorney is barred by the Federal Tort Claims Act, the plaintiff could sue the military attorney in state court. If the acts which constitute the subject of the proceeding reasonably appear to have

been performed within the scope of his duty and he is not the target of a federal criminal investigation with respect to such actions, the Department of Justice will represent him in the civil proceedings.[16] However, there is no provision which would require indemnification in the event the military attorney is held personally liable to the plaintiff.

V. Legislative Developments

A. Legislation Enacted for the Benefit of Government Medical Personnel

In 1970, Congress enacted the Emergency Health Personnel Act (EHPA) which provides that the remedies of the Federal Tort Claims Act "shall be exclusive of *any other civil action or proceeding* by reason of the same subject matter against the officer or employee (or his estate) whose act or omission gave rise to the claim." [17] This provision prevents government medical personnel from exposure to personal liability for malpractice.

EHPA applies to certain medical officers and employees of the public health services and further provides that the Attorney General shall defend the action for the defendant. Upon certification by the Attorney General that the defendant was acting within the scope of his employment at the time the incident out of which the suit arose, the state court proceeding is removed without bond to United States district court, and the action is thereafter deemed a tort action against the United States.[18] Thus, the United States is substituted as a defendant.

Under EHPA the Secretary of Health, Education and Welfare may hold harmless or provide liability insurance for assigned or detailed employees.[19] Additionally, the statute provides that the misrepresentation exception to the Federal Tort Claims Act *shall not* apply to "assault or battery arising out of negligence in the performance of medical, surgical, dental or related functions . . ." [20] Thus, the necessity of determining whether the acts constitute negligence or misrepresentation under the Federal Tort Claims Act is eliminated.

In 1976 Congress enacted the Gonzales Bill [21] which provides that the Federal Tort Claims Act shall be the exclusive remedy for those seeking damages for allegedly improper medical treatment by medical personnel of the armed forces, the Department of Defense, the Central Intelligence Agency, or the National Guard. Provision similar to those in the EHPA authorize the Attorney General to defend the suit, make the suit subject to removal to the appropriate federal district court, and authorize the government to purchase liability insurance for its personnel or to hold them harmless.

Similar statutes currently protect medical personnel in the Veterans Administration [22] the State Department and A.I.D.[23] Government legal personnel have *no* similar protection in malpractice actions.

B. The Rodino Bill

On September 20, 1977, Congressman Rodino introduced H.R. 9219, a bill which would amend Title 28, thus making the Federal Tort Claims Act the exclusive remedy against the *United States* in suits based upon the acts or omissions of the United States Employees.[24] The bill does not provide that the Federal Tort Claims Act shall be a remedy exclusive of *any other civil action or proceeding* against the officer or employee. Thus, H.R. 9219 does not completely protect military legal personnel from individual exposure in legal malpractice actions. If the plaintiff chooses to sue him individually for legal malpractice in lieu of suing the United States, he could be held personally liable.

C. ABA Proposed Legislation

Recently, the American Bar Association Standing Committee on Legal Assistance for Military Personnel conducted an in-depth study of the malpractice liability of active duty and reserve attorneys. The Committee proposed a bill entitled "Defense of Certain Malpractice and Negligence Suits", which was approved by the Committee in its February, 1978 meeting in San Diego. The proposed legislation would

amend the Title 28 and provide that the remedy against the United States provided by the Federal Tort Claims Act:

> Shall be *exclusive of any other civil action or proceeding* by reason of the same subject matter against such judge, judge advocate, legal officer, law specialist, attorney or paralegal or other supporting personnel (or his estate) whose act or omission gave rise to such claim.[25]

The legislation applies to:

> malpractice or other wrongful act or negligence of a judge advocate, law officer or law specialist [and others] in furnishing legal advice, counsel or services while in the exercise of his duties in and for the Department of Defense, the Coast Guard or any other Federal department, agency or institution . . .

Thus, if the plaintiff elects to sue the United States and his action is barred by the Federal Tort Claims Act, he could not recover damages from the military attorney in state court.

In the event that a military attorney is sued in state court, the Attorney General would defend "any civil action or proceeding brought in any court." If the Attorney General certifies that the defendant was acting within the scope of his employment at the time of the incident out of which the suit arose, the state civil action or proceeding would, at any time before trial, be removed without bond to the United States District Court. Thereafter, the action would be a tort action against the United States governed by the provisions of the Federal Tort Claims Act. Thus, the United States would be substituted as a defendant. Finally, the proposed legislation would permit the Secretary of Defense to indemnify, hold harmless or provide liability insurance for the defendant.

VI. Conclusion

The proposed legislation would ensure that military attorneys are not exposed to liability for legal malpractice which occurs within the exercise of their duties. It is similar to the legislation which protects many government medical personnel from individual exposure in medical malpractice suits. Most importantly, the legislation is an effective and comprehensive method of avoiding a legal malpractice crisis in the military.

Notes

[1] Matthews v. United States, 456 F.2d 395 (5th Cir. 1972).

[2] 340 U.S. 135 (1950).

[3] *Id.* at 146.

[4] United States v. Brown, 348 U.S. 110, 112 (1954).

[5] *See, e.g.*, United States v. Brown, 348 U.S. 110 (1954); Layne v. United States, 295 F.2d 433 (7th Cir. 1961); Redmond v. United States, 331 F.Supp. 1222 (N.D. Ill. 1971).

[6] Feres v. United States, 340 U.S. 135, 141 (1950); Hass v. United States, 518 F.2d 1138 (1975); Roach v. Shields, 371 F.Supp. 1392, 1393 (E.D.Pa. 1974).

[7] 456 F.2d 395 (5th Cir. 1972).

[8] 28 U.S.C. § 2680(h).

[9] 366 U.S. 696 (1960).

[10] Matthews v. United States, 456 F.2d 395, 397-398 (5th Cir. 1972); *see also*, United States v. Neustadt, 366 U.S. 696, 706-707 (1960).

[11] *Id.* at 399.

[12] *Id.* at 398.

[13] *Id.*

[14] No. 71-157-E (E.D.Ill. Sept. 17, 1975).

[15] Brooks v. United States, 337 U.S. 49 (1948).

[16] 28 C.F.R. 50.15 (1977).

[17] 42 U.S.C. § 233(a).

[18] 42 U.S.C § 233 (c).

[19] 42 U.S.C. § 233 (f).

[20] 42 U.S.C. § 233 (e).

[21] 10 U.S.C. § 1089. For discussions dealing with malpractice by medical personnel in the military, *see* Machado, *Handling Malpractice Claims*, THE ARMY LAWYER, Jan. 1977, at 5; Rouak, *The Gonzales Bill*, THE ARMY LAWYER, Jan. 1977, at 1; and Zimmerly, *Improving the Resolution of Federal Medical Malpractice Claims*, THE ARMY LAWYER, Jan. 1978, at 1.

[23] 38 U.S.C. § 4116.

[23] 22 U.S.C. § 811.

[24] Section 2679 (b) of Title 28, United States Code is amended to read as follows:

> (b) The remedy against the United States provided by sections 1316 (b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or for claims arising from the violation of the Constitution of the Government while acting within the scope of his office or employment or while acting under the color thereof is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose violation or act or omission gave rise to the claim, or against the estate of such employee.

H.R. 9219.

[25] Emphasis added.

The Judge Advocate General Conducts Sidebar With Army Young Lawyer's Advisory Council

Captain Lee D. Schinasi, Government Appellate Division, USALSA

On 2 February 1978, the Army Young Lawyer's Advisory Council conducted the first in a series of seminars for the Corps.

Major General Wilton B. Persons, Jr., primarily responsible for AYLAC's existence, graciously served as the first speaker. Aiming to provide those in attendance with the latest information on recent developments, General Persons opened the seminar with a short statement, and then fielded numerous questions from the audience.

From the outset of his comments, General Persons was very positive about the current posture of the Corps. Indicating that military justice matters still occupy a majority of the Corps business, General Persons stressed that greater professional service to commanders and their troops will now be possible since the court-martial rate has dropped substantially over the past ten years. Emblematic of this trend is the fact that there were twenty courts-martial per thousand troops in 1969; yet today, there are only four per thousand. While the serious offense rate seems to have remained constant, minor offenses have been reduced due to the Army's aggressive use of administrative elimination procedures designed to separate the non-productive, problem soldier as soon as he is identified. Unit and higher level commanders also have an increased confidence in non-judicial punishments and view them as a viable alternative to courts-martial. This positive switch to other management tools has released many JAGC officers from military justice duties, allowing them to be of more assistance in other areas to commanders.

While the court-martial rates have been dropping during the past ten years, every other legal mission has been on the increase. General Persons specifically addressed civilian litigation responsibilities. That particular division of his office has grown so drasticallly in recent years that a large segment of its obligations must now be shifted to field Staff Judge Advocate offices. While the Chief, Litigation Division, will make the ultimate decision as to which cases are forwarded to the field, captains will now play a greater role in this area. The benefits of this development are obvious. Civilian litigation is exciting, involving issues of great complexity and impact on the military community.

General Persons also suggested that future changes in military justice will enhance the recent gains. The military magistrate's program is one of these developments. In January, the chief trial judge established a procedure for integrating the trial bench into the magistrate program. Each chief circuit judge is now detailing military judges to perform this mission, with the aid of new guidelines provided by the chief trial judge's office.

Probably the most far reaching and exciting new development in criminal justice concerns the "Trial Defense Service," which he has

proposed be established at the United States Army Legal Services Agency in Falls Church, Virginia within the next several months. This organization is a developmental concept springing from the "Field Defense Service Office" which has been in operation for the past year, and has provided virtually every Army trial defense counsel with educational and training assistance. It has also been a clearing house for questions from the field.

Concerning the "Trial Defense Service", General Persons indicated that, if approved, it will create a separate defense "chain of control," responsible to a headquarters at USALSA through ten regional defense counsel spread throughout the world. The headquarters element will be headed by a colonel, with a lieutenant colonel as deputy, a major in charge of operations and a captain. Regional defense counsel will be at least majors, whose primary mission will be to train, and assist defense counsel. For the most part those lawyers currently defending cases will be the first members of the new service. General Persons was quick to indicate that the Trial Defense Service will not be a separate defense corps, or career pattern, but will insure that trial defense counsel remain experienced and qualified, with substantially greater autonomy.

If the system is established, it is envisioned as operating much like the current trial judiciary. Each defense counsel will be assigned from Washington, with a local duty station. He or she will not work for the staff judge advocate, but will receive administrative support from the staff judge advocate. Generally, a defense counsel will spend his or her first one or two years in the Corps as a trial counsel, then after receiving recommendations from the regional defense counsel, and the local trial judge, be certified by Headquarters, Trial Defense Service. Only those trial counsel who have proven themselves qualified in the court room will be selected.

While not able to specify an exact time table, General Persons hopes that the headquarters element of Trial Defense Service will be completed in the spring of 1978, and regional defense counsel selected and in place by the middle of the summer. In the fall, the administrative changes should occur. Because a substantial amount of research has gone into this program, and we have been able to learn from the mistakes and successes of our sister services in this area, it is felt the change over should be smooth. Those commanders who have been informed of the new system generally accept its merit, and are able to visualize its benefits. Substantial additional information will be provided to the field in preparation for implementing the program.

Theoretically, General Persons believes the Trial Defense Service is an idea whose time has come. Conceptually, it should silence our critics who envision possibilities of command influence as a result of the current system. While the Corps has never suffered from this problem, removing that target for criticism is a desirable accomplishment in itself. Additionally, the new system will insure that the current high quality of legal representation to Army accused will continue. Establishing the Trial Defense Services will also enhance our position within the civilian community, although General Persons indicated that several federal judges have complemented him on the quality of JAGC trial and defense counsel. In addition, General Persons believes the trial defense system will permit the Army to make better use of its personnel, and insure that the present substantial amount of workload is evenly distributed. It will remove the staff judge advocate from the defense function, freeing him to do his job more satisfactorily, and with greater flexibility.

(Editor's Note: After the sidebar discussion was completed, TRADOC was chosen to conduct a test of the U.S. Army Trial Defense Services. See the following article.)

Further developments and refinements in military justice are constantly taking place. In meeting with the Joint Service Committee on military justice, review of the Uniform Code of Military Justice, and the Manual for Courts-Martial have been discussed by the Judge Advocate Generals, and the members of the United State Court of Military Appeals. Chief

Judge Fletcher has offered substantially new views in these discussions, being particularly desirous of modeling our system more closely to that of state court structures. The resultant reduction in commanders' involvement with military justice matters has been an obvious topic of discussion. Some agreement in this area has occurred with the possibility of continuing jurisdiction for trial courts now a possibility. At least twenty other revisions to the Code or Manual are also being considered.

In response to questions concerning the Court of Military Appeals current composition, General Persons indicated there was almost uniform agreement that the size of the Court should be increased to at least five judges. This alteration would add stability to the Court, as well as assure the uniform development of military justice. Wide agreement on making each judge's term at least 15 years also exists, particularly as a means of insuring the highest quality membership. While the possibility of Judge Perry leaving the court for another federal judgeship was also discussed, no further developments on that matter were known. In the event Judge Perry did leave the court, General Persons felt it would have a substantial impact on the court's future philosophy.

Concerning the personnel picture, General Persons expressed a desire to take the mystery out of personnel policy decision making, and provide each officer with an understanding of how and why these decisions are made. The October 1977 Personnel Guide answers 90% of all questions received by PPT&O, and should always be consulted before forwarding questions.

While the possibility for advancement in the Corps still remains high, competition for career status and advanced education are keen. Obligated volunteer officers can apply for regular army or voluntary indefinite status after two years on active duty. The selection boards meet during May and November each year, and while competition is fierce, particularly in overstrength years groups, there will always be room for the good officer. It should be noted that graduates of the fully funded legal education programs, and excess leave officers, are also no longer automatically brought into the career force.

Participation in the career course in now determined by a selection board. Officers need not apply for consideration, as annual selections are made every January from those in the zones. All officers not selected for the resident course, should complete this training by correspondence.

The promotion picture for the immediate future also remains bright. Deep zones and our own list continue in effect. JAGC success in promotions to major have been markedly better than other branches of the Army in recent years.

General Persons also indicated that substantial efforts are being made to increase minority participation in the Corps. While no "quotas" exist, the Army is concerned with minority participation, and the JAG Corps shares in that concern. The Corps has recently spent substantial amounts of money and time recruiting minority members, and to a large extent has been successful in getting quality applicants.

Communication from the field is a vital link affecting the Corps, and General Persons encouraged all officers to contact him or Captain Timothy J. Morgan of AYLAC with any question. In the past such inquiries have proven helpful. A plan to formalize investigations into ethical violations via Chapter 4 of AR 27-10 was stimulated by such inquiry. Questions concerning ethical responsibilities, as well as any other matter should be forwarded promptly. General Persons concluded his remarks by encouraging field participation in AYLAC, and communication through the Council to him.

In keeping with his interest in AYLAC, Major General Persons stressed that the council function is to (1) provide an organization through which Army young lawyers, particularly captains, may address The Judge Advocate General directly on professional matters concerning the practice of law as members of The Judge Advocate General's Corps; (2) stimulate the interest of Army young lawyers in the

programs and activities of the American Bar Association, the National Conference of Black Lawyers, the Judge Advocates Association, and other professional organizations, and provide assistance to these organizations; (3) conduct programs and activities of value to Army young lawyers and the legal profession; and (4) initiate public service programs of interest and value to the communities in which Army young lawyers serve.

AYLAC's membership is open to all JAGC officers under 36 years of age, regardless of rank. Captain Malcolm H. Squires, (USALSA-DAF, 289-1391) is the current chairman, with Captain James F. Gravelle (OTJAG-Criminal Law, 225-2193) serving as vice-chairman, and Captain Timothy J. Morgan (OTJAG-Legal Assistance, 225-4321) vice-chairman for captains' affairs. Attorneys in the field are encouraged to contact Captain Morgan concerning any questions or matters of interest.

U.S. Army Trial Defense Services Approved for TRADOC Test

Field Defense Services, USALSA

On 18 March 1978, the Chief of Staff approved a one year test of the U.S. Army Trial Defense Services (USATDS). TRADOC was chosen as the major command to conduct the test. USATDS will become operational on 15 May 1978. The purpose of the test program is to evaluate the desirability of separate offices and support facilities for defense counsel.

USATDS will be composed of a four-man Headquarters Element in Washington, three Regional Defense Counsel, and approximately forty-four Trial Defense Counsel (TDC) and Senior Defense Counsel (SDC) at various TRADOC installations. JAGC officers performing defense serices in TRADOC will be assigned to the United States Army Legal Services Agency (USALSA) with duty station at a particular TRADOC installation.

USATDS will be divided into three regions for the purpose of the test. Regional Headquarters will be located at Forts Benning, Dix, and Knox. A Regional Defense Counsel (RDC) will be at each Regional Headquarters. A SDC and a number of TDC sufficient to perform the defense function will be provided for certain TRADOC installations. Only officers within the defense chain will rate other officers on the performance of defense duties. Administrative, logistical, and clerical support will be provided by local installations. Questions concerning the establishment of USATDS should be directed to either Major Joe Miller, or Colonel Robert B. Clarke, AUTOVON 289-1390, 1391, or 1392.

Impact Statements for Military Justice Changes

Remarks by
Rear Admiral William O. Miller, JAGC, USN,
Judge Advocate General of the Navy,
delivered at the
General Practice Section,
American Bar Association Midyear Meeting,
New Orleans, Louisiana,
10 February 1978.

Surveying the changes we have seen over the past several years in our military justice system—and I might note that all we have seen since 1968 have been products of judicial and not legislative action—I wonder if these changes, which, of course, did not have the benefit of full legislative inquiry and debate, have been good for us.

Some of them, I think, were not.

Some of them, I think, were made without anticipating or understanding what their impact would be.

And some of them, I think, were so basic and fundamental that they deserved that type of predecision anticipation and understanding.

So I think my plea today is for some sort of future, predecision, attention—on the part of those who would fundamentally modify our system—of the effect that the intended modification will have on the ability of the Armed Forces to maintain order—to maintain discipline—and to maintain an effective and immediately responsive fighting force.

What I'm asking for, I suppose, is some sort of Environmental Impact Statement. Other major federal actions significantly affecting the human environment get one.

Why not, here, as well?

The established procedure for effecting fundamental change in the military justice system is either by legislation or by modifying the Manual for Courts-Martial, depending on the nature of the problem. The existing vehicle to originate change is the Code Committee, which was established under Article 67(g), U.C.M.J., and is comprised of the Judges of the Court of Military Appeals and the Judge Advocates General of the Armed Forces. This Committee meets quarterly to consider proposals to amend the U.C.M.J. and to discuss matters of interest and concern. The current Department of Defense legislative package which has had Code Committee attention—if not agreement—contains numerous proposals to amend the U.C.M.J. proposals which, I believe, will significantly improve the military justice system. And with the cooperation—and, I believe, approval of the court, we are working on still other ideas.

It's not my purpose to discuss the legislative proposals at this time, but I would like to just note that their every aspect has been carefully and thoroughly evaluated. These evaluations included the anticipated impact of the proposals on the community the U.C.M.J. was designed to serve, that is, the military community. Thus, the changes, which, I hope, will result from the legislation, will improve the military justice system without any adverse impact on the community as a whole or on the individual serviceman.

The Court of Military Appeals, however, has undertaken, on its own, to implement many of the court's 1975 recommendations on the future of the Uniform Code of Military Justice—and they have done so not through the channels already provided for in the U.C.M.J., but rather by judicial decision. Thus, decisions dramatically affecting the military community are being made without the thorough evaluation present when change results from the close scrutiny of the legislative process. Understandably then, some of the court's decisions have produced unintended and alarming side fects.

This, I think, should be expected—and is probably a philosophical—if not legal—reason for the doctrine of judicial restraint under which courts refrain from taking actions which are more appropriately left to the legislature. Courts, it is said, ". . . have no power to make law, but only to declare the law as it is, construe it, and enforce it. They do not sit to revise legislative action or determine the wisdom of statutes . . . [regardless of how unwise they feel the statute to be]. . . ."[1]

I think this was said, better certainly than I can say it, by Chief Justice Burger when he was on the D.C. Court of Appeals, in the case of *Pauling v. McNamara*,[2] when he wrote:

> That appellants now resort to the courts on a vague and disoriented theory that judicial power can supply a quick and pervasive remedy for one of mankind's great problems is no reason why we as judges should regard ourselves as Guardian Elders ordained to review the political judgments of elected representatives of the people . .[It should be] . . .manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire system of government would suffer incalculable mischief should judges attempt to impose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make better decisions on such issues.

I simply cannot help but reflect on these remarks of Chief Justice Burger when I survey the changes which have been wrought in our system over the past few years—and when I hear of possible future ones.

It hasn't been too long ago when we were told—and I think properly so—that there was a need for changes in our system of military law "so that the law will continue to meet the needs of . . . [the] . . changing [military] society." It was suggested, however, that the military services had defaulted on their responsibilities in this regard and that the Court of Military Appeals had been left by that "default as the actor to bring about change."

It was suggested that the court would—if the military did not—make changes in the following areas:

— restrictions on a convening authority as to what level court he could refer a case,

— possible judicial termination of the historic authority of the commanding officer to provide for the physical integrity of his command by authorizing probable-cause searches, and

— enlargement of the authority of a military judge to confer on him All-Writs Act authority.

I suppose my reaction to these suggestions now, is much the same as it was when they were made.

I do not believe—in all sincerity—that such fundamantal changes are—or should be—capable of being accomplished by judicial action.

But, I recognize, obviously, that there is room for some disagreement on what is properly the subject of judicial vice legislative action—so I would only express the hope that each major decison, wherever taken, and by major decision I mean one which would effect fundamental change—would be preceded by an environmental impact assessment—at least an internal environmental impact statement—so that its probable impact on the ability of our country to maintain an effective military force can be accurately perceived beforehand.

The failure to do this in the past has given us servicemen who receive our pay, wear our uniform, receive our medical benefits—who, in short, have all the benefits of military service—but who have none of its responsibilities, since by recent decisions, they are no longer subject to our disciplinary procedures.

The Comptroller General, as many of you know, has recently reaffirmed the proposition that a serviceman is nonetheless a serviceman—and entitled to the benefits of that status—notwithstanding a Catlow-Russo problem in his enlistment which renders him not subject to courtmartial jurisdiction.

This situation in any military organization—no, in *any* organization—in my view—and in that of the military community at large—is intolerable.

The failure to assess impact has also given us a situation—intolerable as well—where guilty plea convictions must be set aside—even in some of the most serious of cases—where the convening or supervisory authority takes 91 days, rather than 90, to sign his review of the case. This result obtains, mind you, even though everyone concedes there is absolutely no discernible prejudice to the individual involved. We recently has a case in which the Navy Court of Military Review was forced to dismiss the charges because the convening authority did not take his action until the 91st day of post-trial confinement. The case involved the stabbing of a serviceman in the throat with infliction of grievous bodily harm. The accused entered a plea of guilty, the trial was free of any prejudicial error, and the charge was serious.

Balancing the rightful expectation of society to be protected by its judicial system, against the actual harm suffered by this convicted felon, suggests to me, at least, that dismissal, which is mandatory by our present rules, in this situation is a far too drastic remedy. The ultimate loser is the military justice system, the military community, and, hence, all of us who are a part of it or who look to it for protection of our liberties.

Finally, the lack of attention to environmental impact has given us a "service connection" rule which is artificial in the extreme, and which ignores the impact of the act of the military society.

It seems to me that if a criminal act committed by one who is subject to the *in personam* jurisdiction of the Uniform Code of Military Justice, can be said to have an impact on our structure—on our people—on our ability to maintain order, on our ability to ensure readiness for duty, and hence, on our ability to maintain a ready, effective fighting force, then we should have the legal authority to deal with it.

This is what Congress intended, and the Supreme Court has not said otherwise.

But our jurisdiction is now so constrained that we are being rendered helpless in the face of an ever increasing drug problem. Under the present judicially imposed rules, a serviceman can flood our bases with illegal drugs, or whatever, by trafficking with fellow servicemen—even his military superiors—and perhaps, I suppose, his subordinates—as long as he is careful to make his plans and consummate his part of the transaction, outside the gate, and we are powerless to act, never mind the ultimate intended use of these substances, and never mind the degradation of our fighting force that such use creates. We have, here, I think, a classic, inflexible adherence to the form of a rule rather than its intended substance.

I suggest that this is just plain wrong.

The most serious long-term effect of all of this is the loss of respect which it creates for our criminal law system on the part of those subject to it. Loss of respect for a system of law attacks and endangers the very fabric of the society which those laws regulate—for no system can long endure when its legal structure does not command the respect and voluntary compliance of those subject to it.

Discipline in the Navy, or in any of the Armed Forces—never has been—never will be—never could be—maintained by force—just as no police force on earth is big enough to *compel* the obedience of the crowds we have seen in New Orleans this week.

This discipline—this public order—is only possible when most voluntarily comply with the rule of law.

And when respect and appreciation for what one's legal system accomplishes is gone—when the system loses its effectiveness to provide order with a perception of fairness but certainty—then the will to voluntarily submit one's conduct to it goes as well.

This is the real danger I see in rules which permit aberrant servicemen to flaunt their misconduct and our growing inability to deal with it effectively in the faces of the 95 percent of our servicemen and women who voluntarily submit their conduct to our rules.

I say that it's time that those 95 percent of our people get a measure of our attention.

Those 95 percent are entitled to our assurance that their system of law not only protects the rights of individual defendants—but that it protects their rights as law abiding citizens as well. They are entitled to be assured that their system protects the interest of the air crew, of the ship, of the station, in being as free as possible from the criminal conduct of others—and in being able to pursue its mission without the interference of those whose conduct detracts—rather than contributes.

Those 95 percent are entitled to be assured that, when change in their system is made, that it will enhance—not diminish—the respect accorded to it.

Those 95 percent are entitled, I submit, to an in-depth "environmental assessment," when major changes in their system are contemplated.

Such an assessment can best be had in the legislative rather than the judicial process—and it is in that manner that basic and fundamental changes in our system should take place. It is there that full debate can be had—that all shades of opinion can be heard—

and that the influence of all the people, not just litigants in a particular law suit, can be felt.

But wherever—in the courts or in the legislature—those contemplating change, owe it to us all—to all 220 million of us—to make certain, first, that that change will not do fundamental harm to this country's ability to maintain an effective, disciplined, and immediately responsive fighting force.

Else, ultimately, all will be for naught.

Notes

[1] *See* 16 **Am. Jur.** 2d *Constitutional Law* § 225.
[2] Pauling v. McNamara, 331 F. 2d 796.

Military Justice Tomorrow

Chief Judge Albert B. Fletcher, Jr.,
United States Court of Military Appeals

Remarks delivered at the Mid Year Meeting of the American Bar Association, February 12, 1978, at New Orleans, Louisiana.

My purpose in talking with you today is to present an updated view of the state of military justice. Traditionally we have spoken military justice and military discipline in the same breath and the result has been confusion both in the mind of the commander and the military lawyer. The time has passed, I believe, that we can continue to think of justice and discipline synonomously and in the course of this discussion I will define both terms and delineate the essential differences.

Military justice is that system of courts providing protection to the total society from the violators of rudimentary principles necessary for that society to live in peace and harmony. It is true that there is a resultant collateral discipline in the military justice system beyond punishment of the violator. It is that by punishing the offender, all members of the society are on notice that their transgression will be punished in a similar way. Society is thereby disciplined as a whole. However, as you will see, this is not the military discipline that I wish to properly distinguish from military justice.

Military justice finds its foundation in legislative enactments interpreted by judicial officers. The prime concern of those who legislate and those who interpret is protection of the total society.

Military discipline is immediate punishment primarily corrective in nature (129b), whose foremost aim is rehabilitating the offender to function in accord with military principles to accomplish the objectives of the military obligations.

Let us take a look at the tools provided by the legislature and determine whether they fall within the category of military justice or military discipline.

Looking first to procedures provided for under Article 15 of the Uniform Code of Military Justice and Manual interpretation of that provision, I believe it is obvious as the Manual entitles it, "non-judicial, punishment" falls squarely within my definition of the military discipline system. Article 15 proceedings are not criminal prosecutions.

Looking next to the summary courts-martial, classification is not so easy. To aid us we have the Supreme Court in *Middendorf v. Henry* making the following statements. Summary courts-martial "occupies a position betweeen informal non-judicial disposition under Article 15 and the courtroom-type procedure of the general and special courts-martial." "Its purpose" states the Court according to paragraph 79 (a) "is to exercise justice promptly for relatively minor offenses under a simple form of procedure." The Court ultimately stated that a summary court-martial is not a criminal prosecution. The Court concluded that discipline was the prime concern of the summary courts-martial.

Congress placed this form of court-martial in a limited category by not mandating certain due process and equal protection requirements which are required for the special courts-martial or the general courts-martial. Congress, by not providing in either the nonjudicial or summary courts-martial procedure elimination from the services, must have looked to retention in the military of those brought before these tribunals. I view the summary courts-martial as a tool provided by Congress to command for disciplining a person so as to correct his failing and make that person an effective member of that command. I would place summary courts-martial in the military discipline system.

I would like at this time to read a part of paragraph 129 of the Manual for Courts-Martial.

> Commanders are responsible for the maintenance of discipline within their commands. In the great majority of instances, discipline can be maintained through effective leadership including, when required, the use of those nonpunitive measures which a commander is expected to use to further the efficiency of his command or unit and which are not imposed under Article 15. See 128c. When a minor offense has been committed and nonpunitive measures are considered insufficient, authority under Article 15 should ordinarily be used unless it is clear that only trial by court-martial will meet the needs of justice and discipline.

One further matter should be discussed at this point. Congress did not provide for appellate court review under either Article 15 or Article 20, (the summary courts-martial) instead leaving review in the direct command chain or those collaterally under command. I therefore suggest that Article 15 and Article 20 constitute the primary tools for the military discipline system.

If military justice and military discipline are as divisible as I have suggested then appellate courts should adopt a hands-off policy, avoiding either an "ultimate supervisor theory" or authority under *The All Writs Act*. For these forms of discipline are no more their concern than actions taken to eliminate personnel under administrative actions, both being command orientated.

I suggest at this time that discipline is a command function and not a justice function as defined and that if discipline in the military fails it is a command failure and not a military justice failure.

I applaud the total honesty in this area of Vice Admiral James D. Watkins, the Navy Personnel Chief, when he stated in an interview in the Washington Post: "Changing times outran us." He went on to say the Navy "simply did not recognize the new breed." 317 desertions for every 1,000 sailors—the figure registered for fiscal 1977. The Navy was not prepared for "the more qualified, more competent, more mature, more inquisitive and more demanding" young people who started coming in the service in large numbers in 1972. The new breed of sailor seems to be less equipped to adjust to the military structure; less ready to accept authority without a rather significant rationale, well aware of his rights to counsel."

Although we now have "a very complicated individual to deal with," the Admiral said "I would have to say that our leadership and management programs to deal with those complex individuals have not kept pace with the changes."

Most important to me as a member of the civilian sector depending on initial defense from a standing military force was the Admiral's statement "In many cases our leadership can't bridge that gap between the hard driving need to keep our fleet readiness up and the concerns of this new breed of individual."

Command in the Navy, and I believe in all services recognize that there is a "new breed" in the military and like the Navy all services are revising and gearing up new leadership courses which will more effectively match up command and the "new breed," thereby providing a disciplined force to be ever ready to perform its obligation of defense of this country.

If possible I would give a standing ovation to command for their discernment of change and their talent and ability to meet the change. Ladies and gentlemen I have no fear that command will forge this new society into an effective fighting force in the immediate future.

I would now like to look figurewise at numbers of service personnel affected by the discipline system. I take my figures from the Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation for the period covering the fiscal year 1976.

The Army and Navy each discipline 20 + % of their personnel by the use of non-judicial punishment or summary courts-martial. The Coast Guard percentage is 7 + % and the Air Force used non-judicial punishment and summary courts-martial as to 4/10 of 1% of its personnel.

I caution you to remember that differences in personnel use in relation to stated objective could account for the disparity in the figures I have set forth.

Let us look at the percentage of personnel processed through the military justice system by service. The number of persons percentagewise processed either through a special court-martial or a general court-martial in the Air Force is 23/100 of 1%, the figure for the Coast Guard is 5/10 of 1%, 9/10 of 1% is the statistic for the Army, while the Navy figure is 1.6%. Ladies and gentlemen less than 1% of the total military force is referred to either a special court-martial or to a general court-martial.

This suggests to me that any effect military justice has on individual discipline is minuscule.

The military justice system consists of the special courts-martial and the general courts-martial.

We as lawyers associated with the military justice system should now reevaluate that system to see if it meets the need of the new military society. It has been suggested to me that now is the time to study the concept that the military justice system should be separate and distinct from command functions.

In such a consideration we must look first to the objective and obligation of the military society. This objective is to protect this country from any aggressor. It is suggested by some writers that military justice as defined cannot instill discipline in military persons to forge a willingness to fight or die for a particular cause.

Let me cite from Learned Hand to make my point. He said:

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution no law, no court can save it; no court can even do much to help it."

In less eloquent style behavioral scientists say that "People ordinarily obey the law and conform to the requirements of the society in which they find themselves for reasons other than their rational knowledge about or fear of the legal system and its operation."

Unlike those tools used in the military discipline system, special courts and general courts are not to correct an individual but to punish for the protection of the whole society even to the point of elimination from the military by a bad-conduct discharge or dishonorable discharge.

When I think of separating the military justice system from the command function I cannot escape my personal belief that command should not be eliminated from the involvement necessary for them to fulfill their obligation to field a force. It is and always has been necessary for command to decide who he needs to complete a mission and who he does not need. It is suggested that this need can be met by initial decision by command of where a transgressor case shall be handled—in the military discipline system or the military justice system—that is, a decision to prefer charges to either a special court or a general court or disposed of otherwise. Command must retain

the absolute right to suspend the sentence imposed by the sentencing authority so as to retain the adjudged violator in the unit if he needs him.

I believe he must retain control of collateral command personnel utilized by the military justice system, such as the unrestrained power to excuse persons, if randomly selected, from the court.

In structuring such a justice system it becomes imperative that from the time of preferral to the certification of the completed record that a continuing judicial system be present. In my thinking such a system would be staffed the same as today with military persons designated magistrate, trial judge or Court of Military Appeals judge for a definite term of office. Persons appointed to any of the three named judicial offices would during the term of the appointment step outside the military structure into the judicial structure. Appointment to any of the three judicial offices would be made by a Judge Advocate General as well as removal for any violation of the Canons of Judicial Conduct.

In any consideration of a military justice system one must question the need for four Courts of Military Review or trial judges serving only one service branch.

One must keep formost in one's mind the old maxim that a justice system serves its society and that a society does not serve a justice system. This statement does not mean that a justice system should be the slave of the society it serves.

I started these comments with a statement that I would talk concerning the state of military justice. Maybe I should have said I was going to discuss military justice tomorrow—for ladies and gentlemen of one thing you can rest assured—the concept and format of military justice—military discipline will change as surely as the military society has changed. Let us lawyers involved in military justice-military discipline take the initiative, as command has done as to the total military society and see if this justice—discipline system has faults, and if any, correct them from within the system.

What Forum for Accomplishing Change in the Military Justice System?

Major General Wilton B. Persons, Jr.
The Judge Advocate General of the Army

Remarks delivered to the Military Lawyers Committee, ABA Section of General Practice at the Mid Year Meeting of the American Bar Association, 10 February 1978, at New Orleans, Louisiana.

Except for history buffs not many people can name the leading presidential candidates during this country's centennial, but one can speculate that none of them campaigned against *progress*. While progress may not rank with God, mother and country in the public mind, it's close.

Chief Judge Fletcher's remarks today concerned the need for change—progress—in military law. I don't oppose improving the military justice system and I doubt anyone here does. Just what changes are needed, however, is an academic exercise which can be debated *ad infinitum*. What is more important to my mind is the forum for accomplishing change, whether it should be executive, legislative or judicial, and this is what I will comment upon briefly this afternoon.

Any analysis of authority in the federal system must begin with the constitution. The supremacy clause states that "The constitution, and the law of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ." The U.C.M.J. is indeed a "supreme law of the land" made by congress pursuant to its constitutional powers. In my view, therefore, Articles 6 and 36 of the Code, and the powers they give to the Presi-

dent and The Judge Advocates General, can only be called into question by challenging their constitutionality. Until they are held to be unconstitutional, they remain supreme law—unless, of course, Congress decides to change them.

Of course, it is not change *per se* that is undesirable, but its unintended consequences. For example, Okinawa introduced the mongoose to kill poisonous snakes only to discover it was a bigger pest than the snakes.

Obviously, in any legal system, there must be some judicial law making. But, in a systematic sense, judicial legislating is not part of the democratic process. Federal judges are not elected—they have no constituency. The court's view is narrow because it is restricted to the bounds of the adversary system for its decisional base. But Congress makes changes slowly and deliberately with the widest possible forum for differing views. Courts do not have Congress' fact-finding powers or the ability to entertain a variety of opinions through hearings. So when a court embarks on an activist course, as the Court of Military Appeals has, its judicial legislating is a matter of legitimate concern to other participants in the process exercising statutory powers.

Public expressions by Judge Fletcher, as well as a recent revision of the Court of Military Appeals' rules, show movement toward a unified court system administered by an executive working for the highest appellate court—a model which has evolved in many states. Although this model may work for the states, this does not mean it will work for the military or that it is a path the military should follow. State courts have limited, well defined, geographical limits on jurisdictions. There is no civilian equivalent to the military concept of *mission*, and it should be remembered that each service has a variety of unique missions and deployments. Also, civilians are not subject to the command of officers. Even if we were to sit here now and revise the U.C.M.J. using the state court organization model—unburdened by concerns about the opinions of an electorate—I doubt we could come up with a system that would be responsive to the needs of the military.

Article 36(a) of the U.C.M.J. says the President has authority to prescribe rules for procedure before courts-martial. He exercises this authority through an executive order prescribing the Manual for Courts-Martial. Many cases before the Court of Military Appeals over the years have raised the issue of whether a pronouncement in the Manual is procedural or substantive. If a Manual provision is clearly substantive, there seems no question that the law as it applies to courts-martial must finally evolve from the courts of the nation. The President's role under Article 36(a) and the procedural-substantive argument continues to be litigated. An example is the Court of Military Appeals' opinion in *Frederick*,[1] concerning the mental responsibility test in the Manual for Courts-Martial. The Manual test combines McNaghten's rule with the "irresistible impulse" test. Judge Cooke's opinion in *Frederick*[2] held the test for mental responsibility was a matter of substantive law, not within the President's Article 36 rule-making powers. The Court then rejected the Manual test and adopted the definition of insanity recommended by the American Law Institute. In my opinion, this case is illustrative of a proper exercise of the court's powers. Predictably, the procedural-substantive debate will continue on issues not clearly falling in either category.

But, even where an issue is well beyond the Court's review powers under Article 67, or even if the field has been pre-empted by another article, such as Article 6, the court still has not hesitated to act. Examples of the court stepping beyond its statutory role under Article 67 are numerous. The West Point Honor Code cases involved purely administrative hearings. Yet the Court heard argument on an extraordinary writ which sought to stay the separation proceedings.[3] Although it dismissed the case, the dismissal was without prejudice and left open the question of the court's jurisdiction to hear such cases. Nowhere in Article 67 does Congress say the court has jurisdiction over administrative hearings.

vise their conduct. This is not a duty that we take lightly. The quality of representation at court is closely monitored by the senior lawyers of all services. In my opinion, the military sets the standard for excellence in the representation of accused at trial. However, to ensure this important Article 6 function is carried out, we in Army JAG have undertaken several programs.

We have a Professional Ethics Committee which advises me on matters of professional responsibility. It reviews specific cases of alleged misconduct involving ethical questions, and provides me with a recommendation as to what action, if any, should be taken.

Over a year ago, within our Defense Appellate Division, a Field Defense Services Office was established. Its chief purpose is to be a source of up-to-date information on recent court decisions, as well as Department of the Army policy. It also provides practical assistance to defense counsel in the field and has conducted seminars for military defense attorneys throughout the world. Every Army defense counsel has had the opportunity to attend one of these seminars. Along this same line, The Judge Advocate General's School in Charlottesville has added courses in defense advocacy as part of its overall continuing legal education program.

Last spring I adopted a policy of split certification of counsel. Upon completion of the Judge Advocate Basic Course, graduates continue to be certified as trial counsel, but not as defense counsel. Only after a minimum of four months' courtroom experience and recommendations by the supervising Staff Judge Advocate and the military judge before whom he or she practices, is an attorney eligible for certification as the primary defense counsel in general and special courts-martial.

These examples illustrate how may supervisory duties under Article 6 are being accomplished. Counsel are presumed to be acting rationally, intelligently, and always in the best interest of their clients. Like Congress, I am confident we have sufficient means available to supervise this important trust.

The language of Article 6 seems clear enough when it directs The Judge Advocates General to supervise the administration of military justice. But Article 67, which is the source of the Court of Military Appeals' authority, is silent about any supervisory powers the court may exercise over counsel. When a statute is silent in one part but directive in another, then the law is singular in its direction. Rule 4 of the court's rules of practice and procedure, effective 1 July 1977, appears to thrust it into the supervisory area reserved for The Judge Advocates General by Article 6. This rule expands the extraordinary writ powers of the court to include "exercise of supervisory powers over the administration of the [Code]." The court certainly must be allowed to make rules governing practice before it and, indeed, Article 67 gives it that authority. Yet when a rule, as it does here, carves into a statutory provision reserved for another element of the system, then it has no validity.

I can appreciate the sense of judicial frustration that stems from not being able to go beyond the immediate case presented for appellate review. Nevertheless, the roles of the court and the roles of the President and The Judge Advocates General are clearly defined in the U.C.M.J. and must be respected.

What then can be done to clarify for the court the President's rule-making authority under Article 36 and The Judge Advocates General's appointment and supervisory authority under Article 6? One approach would be to amend these articles to make them clearer—though the language in them seems clear enough already. In Article 36, Congress says that the President shall prescribe the procedure "which shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in . . . United States District Courts." A more precise definition of procedure is being considered by the Joint Service Committee on Military Justice as a possible legislative proposal. Article 6, on the other hand, appears to be pre-emptive in the authority given to The Judge Advocates General to control appointments of Judge Advocates and to supervise the administration of

military justice. In view of the court's venturing into it, however, it may also be a worthwhile subject for the Joint Service Committee to study. Meanwhile, Senate Bill 1353 is presently before committee. This bill proposes to allow the Supreme Court to review Court of Military Appeals' decisions by writ of certiorari. Passage would carry with it the potential for resolving some of the issues I have discussed without additional legislation. The route now to the Supreme Court is open only to the accused by way of collateral attack in federal district courts. The proposed Senate bill would enable the government, as well as the accused, to appeal an adverse ruling by the Court of Military Appeals to the Supreme Court. Although this bill would certainly prolong the appellate process in selected instances, it would be a much needed improvement to our system. I welcome this proposed legislation and strongly urge the ABA to give full support to its enactment.

In conclusion, I want to return to a theme I stressed earlier. People make laws through their representatives and such a democratic process should be respected by our courts. Congress has delegated certain powers in Articles 6 and 36 of the U.C.M.J. and, after almost three decades of review, has shown no interest in limiting or otherwise changing these powers. If such powers are not to be judicially recognized, the courts should not act on the basis of whether they view the powers as good or bad—which is nothing more than opinion depending on whose ox is being gored—but on whether or not they are constitutional.

Notes

[1] United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

[2] *Id.*

[3] Harms v. United States Military Academy, Misc. Doc. No. 76-58 (C.M.A., decided Sept. 10, 1976).

[4] McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

[5] United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976).

Appellate Review in the Military Justice System: Can It Be Expedited?

Rear Admiral G.H.P. Bursley, Chief Counsel, United States Coast Guard

One of the primary obligations of those of us who administer the military legal system is to encourage and nurture the continuing development of military justice as a system of justice which protects ". . . the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of . . . military functions."[1] In the almost three decades since the U.C.M.J. came into effect, we have attempted to achieve these objectives while successfully adapting to changing concepts of individual rights. Improvement of the system—driven by the appellate courts in their decisions, the JAG sections of the several services through their implementation action, and the Congress when statutory revision became appropriate—has been both continuous and progressive.

The military justice system—its now more muted, though still numerous, critics will readily tell you—is far from an ideal system of justice. We who are directly involved with its functioning recognize that the system can still be fine tuned to make it more effective in its special role of providing justice in a unique environment.

Since 1949 many proposals for revision have been put forth. A number are currently receiving detailed examination and undergoing critical review as part of a current proposal for Code revision. One of the areas in which revision has been suggested is appellate review. As you know, a military defendant who has been sentenced to a punitive discharge or confinement of one year or more has the right of automatic appeal to the Court of Military Review for his service for a review of the law and the facts in his case. The proposed legislation

will allow the accused to waive his appeal right in certain limited circumstances.

While the positive effect a waiver of certain appeals would have on overcrowded appellate dockets is clear, this proposal involves the abandonment of a hallmark of the military appellate system—automatic appeal—which may not be politically acceptable. Can the desired end be reached another way? To my knowledge there has been no examination of a possibly important source of judicial delay: the increased workload resulting from the extended scope of the review vested in each service's Court of Military Review by the Code. Article 66(c) provides the first tier—which the Court of Military Review occupies—of the military appellate system with unique powers far in excess of those exercised by comparable civilian courts. Unlike these courts and the Court of Military Appeals, whose powers of review are limited to legal issues, a Court of Military Review "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record (the court) may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, . . ."[2] To discharge this responsibility a time consuming review of the entire record must be made by each member of the court.

The present Courts of Military Review—known as Boards of Review before the Code revision of 1968—evolved from the appellate tribunals which were created by Article 50 one-half of the 1920 Articles of War to review for legal sufficiency sentences imposed by general courts-martial.

These Boards played an important role in the Army until the enactment of the U.C.M.J. in 1949. Even during World War II, when our military justice system was strained to capacity, they functioned effectively in providing the Army with a needed system of timely appellate review. As a result of the World War II experience and in response to public clamor against perceived abuses of the military justice system, the drafters of the U.C.M.J. adopted the Board of Review concept for uniform use. At the same time, however, the Congress expanded the appellate process by extending the scope of review to include those unique fact-finding powers which Article 66(c) today enumerates.

Since their inception as Boards of Review, the Courts of Military Review, staffed by a professionally qualified judiciary composed of both civilian and military members, have had a major role in defining the parameters of military justice. Although the Court of Military Appeals, in its function as the final appellate authority, has had many occasions to differ with the Courts of Military Review, it has rarely had occasion to question the zeal of these courts for the rights of military defendants. The lower appellate courts, for their part, have recognized, accepted, and properly employed their review powers while paying strict adherence to the Code's mandate to recognize ". . . that the trial court saw and heard the witnesses."[3]

As I have mentioned the functioning of the Courts of Military Review as both appellate courts and secondary triers of fact is another aspect of military justice which is unparalleled in the civilian criminal justice system. In providing a further factual review to the convicted defendant, who in effect receives a second bite at the judicial apple, the Court of Military Review function becomes a more protracted and complex system. Are the benefits of this second evaluation of the evidence commensurate with its burden? Would elimination of the second look impugn the fairness of the military justice system?

Acknowledging the constricted environment in which the military appellate courts operate and the specific and sometimes misunderstood needs of the armed forces, should we at this time attempt to "civilianize" the Courts of Military Review by limiting their powers to those of civilian courts of comparable function? Should the Courts of Military Review be brought more in line with the standards relating to appellate courts adopted by the ABA

"Commission on Standards of Judicial Administration?" The duty of an appellate court (as set forth in section 3.11 "Scope of Appellate Review") is to ". . . determine whether the court below relied on properly applicable and correctly interpreted rules of law, conducted the proceeding fairly and deliberately so that there was no substantial prejudice to the parties, and rested its determination of factual conclusions reasonably supported by the evidence."[4] The commentary following § 3.11 circumscribes appellate reviewing authority with some basic principles: determination of factual issues is the responsibility of the trial court; an appellate court is a court of review, not one of original jurisdiction, which should only disturb the decision of review "when the proceedings taken as a whole . . . have resulted in a denial of substantial justice or involved a serious departure from established procedure."[5]

As "secondary trier(s) of fact" the Courts of Military Review as they presently function do not exactly meet these standards. They are in a position to substitute their judgment for that of the original triers of fact. Their track record is that they do not. These courts have utilized their extended powers in performing the duties of an appellate court without derogating their basic mission of serving justice in the military services. It, therefore, cannot be said that stripping off these unique powers has a compelling conceptual argument behind it.

The real justification could only be that Courts of Military Review would function more effectively if the scope of review were "civilianized" and brought more in accord with the ABA Standards; the time required for review would be lessened. Even in the post-Vietnam era, the military caseload remains substantial. The specific requirement that a "law and fact" determination be based "on the basis of the entire record" and the time consumed in compliance therewith greatly expands the judicial workload. Are we satisfied that there is a companion improvement in the quality of military justice? I think it can be posited that trials under the Code, as it has evolved over years of testing which included two combat periods, are now fairer and more judicious and, as such, more closely approximate civilian trials than they did at the time of the enactment of the U.C.M.J. Therefore, to move to the traditional scope of review may well be a timely act of judicial streamlining which would bring the military appellate process in line with the civilian counterpart with no derogation of the rights of the accused.

I raise this possibility for your consideration not out of any conviction that it should or should not be adopted. The pros and cons of either side are fairly clearcut, but have not as yet been critically examined as to their impact. But it may well now be fitting—at a time when we are considering ways to reduce demands on our appellate processes—to assess the need for a change in the appellate process itself rather than directing our attention to access to the Courts of Military Review.

In our consideration of an Article 66(c) revision, we must be mindful of the basic premise that the military legal system must ensure that justice is done; but its effectiveness must also be measured in terms of its impact on the armed forces. If an attempt to expedite the activity of the Courts of Military Review by limiting the scope of review of Article 66(c) curtails a substantial protection presently afforded the convicted servicemember, we cannot entertain it. If, on the other hand, the role of Courts of Military Review as triers of fact is an anachronism, we should not be afraid to abandon it.

Even at the risk of antogonizing our most watchful and vociferous critics, if such a "civilianization" of the military justice system will better serve the armed forces and their members in providing more timely justice, we should not hesitate to begin examination and, if appropriate, bring forth proposals to revise Article 66(c). It may be a course that is more acceptable to the public than seeking to curtail the concept of automatic review.

Notes

[1] From Secretary Forrestal's directive to the Forrestal Committee as reported by Professor Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 174 (1953).

[2] UUNIFORM CODE OF MILITARY JUSTICE, art. 66(c), 10 U.S.C. §866(c) (1970 [hereinafter cited as U.C.M.J.].

[3] U.C.M.J. art. 66(c).

[4] ABA Standards Relating to Appellate Courts 19 (Tent. Draft 1976).

[5] *Id.* at 21.

Professional Responsibility

Criminal Law Division, OTJAG

1. Communication with convening authority about sentence. The Judge Advocate General's Professional Responsibility Advisory Committee recently considered a case involving a question whether a military judge's action in communicating with the convening authority about a sentence was a violation of the American Bar Association Code of Judicial Conduct. The pertinent provision of the ABA Code considered by the Committee was Standard A(4) of Canon 3 relating to adjudicative responsibilities. The standard provides:

> (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he give notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

A military judge, sitting as a special court-martial without members, while determining a sentence, telephoned the convening authority having responsibility for initial review and action on the record. The call was made without advance notice to either party to the trial. The conversation resulted in an agreement or an understanding that, if the judge imposed a sentence to confinement and recommended suspension, the convening authority would suspend the confinement as recommended by the judge.

According to the special court-martial order considered by the Professional Responsibility Advisory Committee, the sentence imposed was "to be confined at hard labor for a period of 30 days, the Military Judge recommends suspension of the confinement at hard labor for 30 days [,] and to perform hard labor without confinement for a period of 30 days and to receive a severe reprimand from your superior commanding officer." When the military judge announced the sentence in court, he advised the parties that he had called the convening authority and that the latter had agreed to suspend as recommended. Neither the trial nor the defense counsel objected. Moreover, the defense opposed a rehearing on the sentence, which apparently was being contemplated before the convening authority's initial action on the record. The convening authority approved the sentence but suspended its execution for two months with provision for automatic remission. A successor in command withdrew the previous action and approved only so much of the sentence as provided for a reprimand. Subsequently, the supervisory general court-martial convening authority set aside the entire sentence.

The Advisory Committee stated that despite the many and increasing similarities between the authority and responsibility of the military trial judge and his civilian counterpart in federal and state courts, significant differences remain. One of these pertains to the sentencing process; the military judge, for example, is not authorized to suspend sentence, that power being reserved to other authorities. The Committee also noted the length to which the U.C.M.J. goes to preserve the independence of persons acting at various stages of the judicial process, citing Article 37*a*, U.C.M.J. The Committee stated:

> So well known is the criticism of the armed forces (whether justified or not) for failing

to maintain a separation of powers and so numerous the appellate decisions condemning even the appearance of violating such provisions . . ., that specific citation . . . seems unnecessary.

The Advisory Committee concluded that the military judge's action in communicating with the convening authority with regard to the sentence was a communication of the type forbidden by Canon 3 and violated the spirit, if not the letter of Article 37, U.C.M.J.

2. Legal assistance officer has accepted employment. An inquiry was recently received by the Office of The Judge Advocate General from an installation legal assistance officer concerning the application of Ethical Consideration 2-30, ABA Code of Professional Responsibility, which reads in part:

> If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws or the client terminates the prior employment.

The question was whether a legal assistance officer should advise a person who already has an attorney-client relationship with another attorney, usually civilian, and is seeking a second opinion in the same legal matter. The concern was whether a legal assistance officer is employed in the sense of EC 2-30, as no contract is made, or fee paid.

Deeming the question so well settled as to not require reference to The Judge Advocate General's Professional Responsibility Advisory Committee for opinion, The Judge Advocate General directed that the inquiry be answered as follows:

> A Legal Assistance Officer conferring with a person on a particular legal problem is considered as accepting employment within the meaning of Ethical Consideration 2-30. Accordingly, a Legal Assistance Officer may not provide legal assistance to a person who has established an attorney-client relationship with another attorney in the same general matter, unless the other attorney approves, withdraws, or the client terminates the prior employment.

Judiciary Notes

U.S. Army Judiciary

ADMINISTRATIVE NOTES

1. Supplementary Court-Martial Orders—Rehearings.

(1) The following supplementary court-martial order may be issued where the appellate court had authorized a rehearing and the convening authority directs a rehearing:

> In the (general) (special) court-martial case of . . . . ., pursuant to Article (66) (67), the (findings of guilty and the sentence) (findings of guilty of Charge I and its specification and the sentence) (sentence) as promulgated in (General) (Special) Court-Martial Order Number_____, (this headquarters) (Headquarters,_____), dated_____, (as modified by_____), (were) (was) set aside on_____. (A rehearing is ordered before another court-martial to be hereafter designated) (A rehearing as to Charge I and its specification and the sentence is ordered before another court-martial to be hereafter designated).

(2) The following supplementary court-martial order may be issued where the convening authority has determined, as authorized, that a rehearing is impracticable:

> In the (general) (special) court-martial case of . . ., pursuant to Article (66) (67), the findings of guilty and the sentence as promulgated in (General (Special) Court-Martial Order Number_____, (this headquarters) (Headquarters,_____), dated_____, (as modified by_____), were set aside on_____. A rehearing is not practicable. (The accused's application for discharge from the United States Army

under the provisions of Chapter 10, AR 635-200, was approved on_____). The charges are dismissed. All rights privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.

(3) The following supplementary court-martial order may be issued where the convening authority has directed a rehearing and thereafter has determined that a rehearing is no longer practicable:

In the (general) (special) court-martial case of . . ., pursuant to Article (66) (67), the findings of guilty and the sentence as promulgated in (General) (Special) Court-Martial Order Number_____ , (this headquarters) (Headquarters,_____), dated_____, (as modified by_____), were set aside on_____, (and a rehearing ordered per (General), (Special) Court-Martial Order Number_____, this headquarters, dated_____, (and Court-Martial Convening Order Number_____, this headquarters, dated_____, (as amended by_____)). A rehearing is no longer practicable. (The accused's application for discharge from the United States Army under the provisions of Chapter 10, AR 635-200, was approved on_____). The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.

(4) The following court-martial order may be issued where the proceedings on rehearing have commenced and thereafter the convening authority determines, as authorized, that the proceedings should be terminated:

Before a (general (special) court-martial which convened at_____, pursuant to Court-Martial Convening Order Number_____, this headquarters, dated_____, (as amended by_____), (appeared) (was arraigned) (was arraigned and tried) on a rehearing, the former proceedings having been published in (General) (Special) Court-Martial Order Number_____, (this headquarters) (Headquarters,_____), dated_____, (as modified by_____):
(Name paragraph)
(Charges and Specification on which a rehearing has been directed)
(Pleas, if any)
The accused having (appeared (been arraigned) (been arraigned and tried), the charges were withdrawn by the convening authority on . The charges are dismissed. (The accused's application for discharge from the United States Army under the provisions of Chapter 10, AR 635-200, was approved_____). All rights, privileges and property of which the accused has been deprived by virtue of these proceedings will be restored.

2. Initial Promulgating Orders—Changes. For the months of February and March 1978, the Army Court of Military Review, by means of a Court-Martial Order Correcting Certificates made the following changes to the initial promulgating order:

(1) There were four cases in which the specifications shown in the promulgating order differed substantially from what the accused was actually arraigned on as transcribed in the record of trial.

(2) There were three cases in which the pleas, findings and sentence paragraphs were incorrectly set forth in the promulgating order.

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Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?

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The legality of the military practice of admitting CID laboratory reports as prosecution exhibits at trials by courts-martial, for use in identifying substances obtained from the accused as being controlled drugs, is currently being re-examined by the Court of Military Appeals (henceforth cited as "C.M.A."). In the case of *United States v. Santiago-Rivera*, CM 434420 (A.C.M.R. 23 March 1977) (SFA), *pet. granted* (Docket No. 34,242) 5 July 1977, the military court of last resort specified the question of whether such laboratory reports were admissible. This development is significant because, in the majority of contested drug cases tried by courts-martial, the government proves that the substance in question is indeed contraband by offering a laboratory report rather than by presenting the live testimony of the chemist who performed the analysis identifying the drug. The potential scope of the *Santiago-Rivera* decision is awesome because C.M.A. is currently granting a large number of "trailer case" petitions,[1] and it is likely that hundreds of drug cases will eventually be held in abeyance while *Santiago-Rivera* and its possible progeny undergo protracted appellate litigation. The decision in that case will probably not be announced until the summer of 1978 because oral argument has not yet been scheduled. Meanwhile, military practitioners should be acutely aware of the issues raised by *Santiago-Rivera* because the eventual C.M.A. decision could profoundly influence the future administration of the military justice system. In light of these circumstances, the purpose of this article is to explore the issues raised by *Santiago-Rivera*, to attempt to predict the eventual C.M.A. decision, and to offer suggestions for prosecutorial case management during the interim before that decision is announced.

BACKGROUND.

The factual development of *Santiago-Rivera* was not remarkable. The appellant was convicted, despite his pleas, of six specifications alleging the possession and sale of marihuana in violation of Article 92, Uniform Code of Military Justice. He was sentenced by General Court-Martial to total forfeitures of pay and allowances, confinement at hard labor for eighteen months, and a bad-conduct discharge. At trail, Specialist Five ("SP5") Santiago-Rivera objected to the admission of the marihuana, asserting that the chain of custody was defective because agents of the CID had used outdated property receipt forms in tracing the custody of the drug (*Santiago-Rivera* record of trail at pages 131 and 138-139, henceforth cited as "R._____"). The trial judge denied this motion (R. 139). Subsequently, the prosecution offered the CID laboratory reports for the purpose of identifying the seized substance as marihuana, whereupon the trial judge asked the accused's civilian defense counsel if they desired the presence of the chemists who had examined the drug (R. 113). These counsel replied that they did not (*Id.*), and the laboratory reports were subsequently admitted without defense objection (R. 139). Before the intermediate military appellate court, the Army Court of Military Review, the appellant contested the trial judge's ruling admitting the documents which established the chain of custody of the marihuana. That court affirmed the findings and sentence without opinion, and SP5 Santiago-Rivera renewed his chain of custody contention in a petition for review by C.M.A. The Court of Military Appeals granted the petition on the instant issue, which it had specified, but denied relief on the issue raised by SP5 Santiago-Rivera.

C.M.A. has twice previously addressed this issue, both times ruling in favor of the admission of laboratory reports. In *United States v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972), C.M.A. held that a "crime laboratory" is a place where testing of various items is con-

ducted, and where the results of these analyses are recorded and reported in the regular course of the lab's business. This practice causes laboratory reports to fall within the business entry exception to the hearsay rule. It found that the entries on these reports are sufficiently factual to escape the opinion limitation on the admission of business entries. It also ruled that these reports are not made principally for the purpose of prosecution because the evidence examiner's duty is to identify the substance involved, an intrinsically neutral fact. The court noted, however, that despite the admissibility of the report:

> . . . we do not intimate that the accused must forgo the right to attack the report's accuracy. If he wished to do so, he may have the analyst summoned and "attack the regularity of the test procedure and the competency of the . . . [person] who ran the test" [citation omitted]. *United States v. Evans, supra,* at 45 C.M.R. 356.

Such an attack would affect the weight, but not the initial admissibility, of the report.

Two years later, C.M.A. reexamined its ruling in *Evans* in response to the defense assertion that the *Evans* court had ". . . not directly consider[ed] the relationship between a business entry and the right of the accused, assured by the Sixth Amendment of the United States Constitution, to confront the witnesses against him." *United States v. Miller,* 23 C.M.A. 247, 248, 49 C.M.R. 380, 381 (1974). C.M.A. there held the lab report business entry was admissible without the in-person testimony of the chemist, but that the accused could assert his right to confrontation by calling the declarant as a witness and examining him as if he were under cross-examination. Thus, the court attempted to protect the rights of the accused while providing the government with an inexpensive and expeditious mode of proof.

Following the enunciation of the *Evans-Miller* doctrine, the practice of using crime laboratory reports to identify contraband substances became so prevalent that such reports are now introduced in the vast majority of contested military drug trials. A change in this practice would have a practical effect upon the administration of military crime laboratories. The three Army crime laboratories, located at Fort Gordon, Georgia, Frankfurt, West Germany, and Camp Zama, Japan,[2] provide support for wide geographical areas of military operations.[3] Although there are only fifty authorized laboratory examiners to staff these three laboratories, they process approximately 750 requests per month, including those from Armed Forces other than the Army.[4] Therefore, requiring the chemist to testify at every contested drug trial would have obviously a negative effect upon the volume of requests processed by these laboratories. Although cost to the government is not a factor which justifies denial of an accused's rights, the data regarding Army crime labs does illustrate the importance of the pending *Santiago-Rivera* decision.

THE DEFENSE POSITION.

In a Final Brief to C.M.A. prepared by Captain John Richards Lee of the Defense Appellate Division, appellant asserted a two-pronged argument urging that *Evans* and *Miller* be reversed. Appellant contended that the laboratory reports were incompetent as evidence to prove the identity of the drug in question because they were hearsay which failed to fall within the scope of any exception to the hearsay rule, thereby preventing the prosecution from meeting its burden of proof. SP5 Santiago-Rivera also submitted that even if the lab reports could be construed as being business entries, they nevertheless are incompetent hearsay because they violate the requirements of the "Confrontation Clause" of the sixth amendment to the United States Constitution. Each of these arguments will be addressed separately.

The lab reports are deemed to constitute inadmissible hearsay because they contain statements by the lab examiners which were made while the preparer was not present at trial and which were offered to prove the truth of the matters stated therein. Article 36 of the Uniform Code of Military Justice ("U.C.M.J.") empowers the President to promulgate rules

governing ". . . . procedure, including mode of proof before courts-martial." These rules of evidence, as determined by the President, are set forth in the Manual for Courts-Martial, United States, 1969 (Revised Edition) (henceforth cited as either "MCM" or "Manual"). Paragraph 139*a* of the Manual defines the hearsay rule as follows:

> A statement which is offered in evidence to prove the truth of the matters stated therein, but which was made by the author when not a witness before the court at the hearing at which it is offered, is hearsay.
>
> . . .
>
> Hearsay may not be recited or otherwise introduced in evidence, and it does not become competent evidence by reason of a mere failure to object to its reception in evidence.

The Manual also enumerates the principal exceptions to the hearsay rule. Paragraph 144*c* requires that items must meet the following two prerequisites to be admitted under the business entry exception: (1) it must have been made in the regular course of some business, and (2) it must have been the regular course of that business to make the writing in question. The exceptions to the hearsay rule have been narrowly drawn because the *raison d'etre* for the rule itself is to ensure the trustworthiness of evidence, and each of the exceptions is based upon a premise which assures this result.[5] Consequently, a proper foundation establishing that an offered document qualifies as a business entry must be laid as a condition precedent for admission.[6] In the instant case, the only foundation laid for the lab reports consisted of the certificate from the report custodian attesting to the authenticity of the document (Prosecution Exhibits 4 and 5), motivating the defense to contend that, in accordance with the prevailing civilian rule,[7] the testimony of a live witness was required to establish a proper foundation.

The appellant also asserted that laboratory reports are inadmissible because they constitute opinion evidence and because they are prepared principally for the purposes of prosecution, arguing that *Evans* should be overruled.

Appellant contended that identification of a substance by chemical analysis involves conclusions containing subjective opinions and not merely facts or events.[8] In *McCarthy v. United States*, 399 F2d 708, 710 (10th Cir. 1968), the court characterized expert testimony that a particular substance was LSD as being opinion:

> He testified he used the thin layer chromatography method in testing the tablets to determine if they contained LSD. He stated that in conducting the test he ran checks with three different solvents. He further testified that the test he employed was accepted as a proper method in determining whether LSD was present in the tablets, and that *based on the results of the test, with different solvents, it was his opinion* that the ten (10) tablets contained LSD (emphasis supplied).

In *Wolf v. United States*, 401 F.2d 332, 332 (10th Cir. 1968), the court again characterized such testimony as opinion:

> Three chemists employed by the United States Food and Drug Administration qualified as experts in the field of drug analysis and identification. After testing and analyzing the material by the use of accepted and recognized methods, all testified that in their *opinion* the capsules contained LSD. Scientific testing procedures and methods of laboratory analysis are *matters of professional judgment about which experts may differ* (emphasis supplied).

Finally, *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), holds that reports prepared principally for the purpose of prosecution are inadmissible, and lab reports constitute such.

In the second prong of his attack, appellant urged that *Miller* be overturned because the result there violates the "Confrontation Clause" of the sixth amendment. The pertinent part of this clause is as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

In *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337, 39 L.Ed. 409 (1895), the Supreme Court stated that the primary objective of the confrontation guarantee is the prevention of:

> depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

The relationship between the hearsay rule and the Confrontation Clause was elucidated by the Supreme Court in *California v. Green*, 399 U.S. 149, 155-156, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970), as follows:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more nor less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. *See, Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

Consequently, some hearsay that arguably qualifies for admission under a recognized hearsay exception must be excluded when offered against an accused because its admission would violate the accused's right to confront witnesses against him. In *United States v. Lipscomb*, 435 F.2d 795, 802 (5th Cir. 1970), the court made the following comment regarding the admissibility of business records in criminal cases:

> Business records are admissible in federal court as evidence of a transaction or occurrence if made in the regular course of business and if it was the regular course of business to make such records within a reasonable time of the transaction or occurrence . . . Of course, not all records may be admissible in all cases in a criminal trial; it is the duty of the court to determine in each instance whether the particular record is constitutionally admissible under the Sixth Amendment guarantee of confrontation of witnesses.

In the instant case, laboratory reports were received into evidence without the testimony of a chemist in order to prove the identity of the controlled substance which appellant sold, prompting the appellant to contend that receiving laboratory reports under such circumstances denies an accused the right of confrontation of witnesses.

Two recent cases buttress SP5 Santiago-Rivera's position. In *State v. Henderson*, 544 S.W. 2d 117 (Tenn. 1977), the Tennessee Supreme Court considered a case where laboratory reports were received into evidence to prove the identity of a controlled substance. A chemist there testified that the laboratory reports had been prepared by analysts working under his supervision. After analyzing many of the U.S. Supreme Court decisions dealing with the "Confrontation Clause," the court held that receiving laboratory reports under such circumstances denied the accused's right of confrontation under the Federal Constitution even though the reports may be encompassed by the business record exception to the hearsay rule. That court concluded that at least three criteria must be met in order to satisfy federal "Confrontation Clause" requirements regarding prosecution evidence: (1) by implication the evidence must not be "crucial" nor devastating;

(2) the prosecution must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant; and (3) the evidence offered under a hearsay exception must bear its own "indicia of reliability". Regarding the requirement that the hearsay must bear its own "indicia of reliability," Santiago-Rivera noted that the laboratory reports in his case identified a controlled substance, apparently by chemical analysis, without providing any basis to establish: (1) that the out of court declarant qualified as a chemist, schooled in his field; (2) that he was qualified to perform chemical analysis of marihuana; (3) that standard generally accepted chemical tests were used; and (4) that the chemical tests were properly conducted. Similarly, there was no testimony of a custodian or other qualified witness establishing the fact that the reports were prepared in the regular course of the laboratory's business.

Additionally, in the recent case of *United States v. Oates,* 560 F.2d 45 (2d Cir. 1977), the court was confronted with a laboratory report prepared by a chemist employed by the United States Customs Service. The Court found that "full time chemists of the United States Customs Service are 'law enforcement personnel.' " *Id.* at 68. Based upon this finding, the court excluded the exhibit from the public record exception to the hearsay rule established by Rule 803(8) of the Federal Rules of Evidence.[9] As a report of law enforcement personnel, the Court also excluded the exhibit from the business record exception to the hearsay rule (Rule 803(6), FRE). *Id.* at 84.

Thus, the defense in *Santiago-Rivera* was able to muster a substantial array of authority to support its attack on the *Evans-Miller* doctrine.

THE GOVERNMENT REBUTTAL.

The government pleadings, prepared by Captains Richard A. Cefola and Richard A. Kirby of the Government Appellate Division, attempted to refute SP5 Santiago-Rivera's arguments. Essentially, the government maintained that the lab reports were properly admitted under an exception to the hearsay rule. This reply was based upon several arguments which will be separately discussed below.

When the authority cited by the appellant is considered in proper historical perspective, it is clear that the military rule is consistent with current federal law. The current military rule regarding the admissibility of documents as business records [10] is almost identical to the prior federal rule contained in the Federal Business Records Act.[11] That Act was substantially repealed in favor of Rule 803(6), FRE.[12] In enacting Rule 803(6), Congress intended to incorporate the Federal Business Records Act and preexisting federal law.[13] Thus, the "trustworthiness" language was added the Federal Business Records Act to insure consistence with case law and the leading case on the question: *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 447, 87 L.Ed. 645 (1943), (holding reports prepared principally for the purpose of prosecution inadmissible). This "trustworthiness" qualification which was added to the FRE already existed in military law.[14] This conclusion regarding the Congressional intent behind Rule 803(6), FRE, has been noted, albeit in *dicta,* by the D.C. Circuit in *United States v. Smith,* 521 F.2d 957, 968 n.24 (D.C. Cir. 1975):

> The same result would be reached under the Federal Rules of Evidence. Rule 803(6) contains the business records exception in much the same form as it is found in the Business Records Act. *See* notes 10-11 *supra. Congress, which considered the FRE at great length, can be presumed to have been aware of the interpretation of the business records exception current in the courts when it approved Rule 803(6). See* 2A *Sands, Sutherland Statutory Construction,* Section 49.09 (1973); *cf. Georgia v. United States,* 411 U.S. 526, 533, 93 S.Ct. 1702, 36 L.Ed. 2d 472 (1973). *See also* Advisory Committee's Note to Rule 803, 56 F.R.D. 303, 309 (1973) (discussing admissibility of police records during explanation of Rule 803(6)). Of course, Congress must also be deemed to have continued the restriction the doctrine of *Palmer v. Hoffman* places on the use of police reports by the prosecution. *The clear congres-*

sional intent to preclude the Government from using the reports of law enforcement personnel in a criminal trail . . . (emphasis supplied).

Thus, the military rule on the admissibility of laboratory reports as espoused in *Evans* and *Miller* was consistent with, and was intended to bring military practice into conformity with, existing federal law. When Congress simply recodified existing federal law regarding the admissibility of business records, the resulting rule was not inconsistent with the *Evans-Miller* rule.

Secondly, the *Oates* and *Henderson* decisions represent a substantial departure from pre-existing federal law which is at variance with other circuit court decisions interpreting Rule 803(6). In the federal courts, it has long been the rule that a laboratory report, prepared by government employed laboratory examiners, falls within the business entry exception to the hearsay rule: *United States v. Ware*, 247 F.2d 698, 699 (7th Cir. 1957) (drug analysis prepared by government employed chemist); *Thomas v. Hogan*, 308 F.2d 355, 360 (4th Cir. 1962) (blood analysis prepared by Naval chemist).[15] The *Oates* court's conclusion that the federal rules of evidence require the exclusion of police reports or reports of law enforcement personnel is consistent with prior authority, yet that court's conclusion that laboratory analysis by chemists employed by law enforcement agencies constitute "police" reports is inappropriate. This statement is not only at variance with pre-existing federal law as manifested by *Ware*, but also with the interpretations of the Rule 803(6) by other circuits. The D.C. Circuit, as noted above, would apply the *Ware* line of cases to the new Federal rule. *United States v. Smith, supra*, 521 F.2d at 967, 968 n.24. The Eighth Circuit Court of Appeals has applied rule 803(6) to permit the introduction of computer printouts summarizing data regarding drug analyses by chemists from the Drug Enforcement Agency. *United States v. Scholle*, 533 F.2d 1109 (8th Cir. 1977). This printout was developed by an employee of the Drug Enforcement Administration, and the court likened it to a "recorded laboratory analysis" citing the Federal Business Records Act and holding that it was admissible under the new federal rule. *Id.* at 1123-25. Thus, a correct interpretation of the applicable law undermines the defense position. SP5 Santiago-Rivera's reliance on *Henderson* is also misplaced because, in that case, the accused specifically objected to the introduction of the lab reports.

Thirdly, in C.M.A.'s *Evans* decision, it recognized that a chemist's report is not prepared for the purposes of prosecution.[16] C.M.A. determined that chemical analysis, like pathologists' reports, are instinctively neutral. This was correct because chemists determine the identity of the substance given them; prosecution may flow if the substance proves to be a controlled item, but a negative report eliminates the possibility of prosecution. Just as a pathologist's job is to determine the cause of death, not who caused the death, the chemist's job is to determine the identity of the substance, not who possessed the substance. As the former's report is admissible under the subject *Manual* provision, the latter should be equally admissible. This conclusion is reinforced by consideration of the realities of law enforcement practice. The majority of the chemists employed by the Army CID to analyze suspected drugs are civilians. The marihuana examiners are generally Army enlisted personnel. All of these examiners, however, are scientists. As previously noted, the Army currently has three crime laboratories serving the entire world. These laboratories are commanded by Army Chemical Corps officers who are not policemen and who have no law enforcement training. Most of the analyses made are upon substances received from distant outposts. The individual chemists rarely have any contact with the police officers or agents involved in the investigation or apprehension of the persons involved. Both the defense and the government may initiate examination requests. By regulation and practice, it is the CID evidence custodian who dispatches particular items of evidence to the crime laboratories for analysis. Therefore, these examiners are not police personnel.

Fourthly, the use of lab reports did not deny

the appellant his right to confrontation of the lab examiner. The decision in *Miller* that the accused's right to confrontation is protected by affording him the opportunity to call the analyst to the stand for the purposes of cross-examination is correct. The business entry exception to the hearsay rule, which has long been recognized by the federal courts[17] as well as by C.M.A. in *Evans*, does not violate the accused's confrontation rights. As Justice Harlan aptly enunciated in *Dutton* v. *Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970):

> If one were to translate the Confrontation Clause into language in more common use today, it would read: "in all criminal prosecutions the accused shall enjoy the right to be present and to cross-examine the witnesses against him." Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . . A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants *where production would be unduly inconvenient and of small utility to a defendant. Dutton v. Evans*, 400 U.S. at 95-6, 91 S.Ct. at 231-2, 27 L.Ed. 2d at 230-1. (Harlan J., concurring) (emphasis supplied).

Under current military law, the accused has an absolute right to request the presence of the chemist. However, in the majority of cases in which the identity of the seized substance is not at issue, it would be "of small utility to a defendant" to have the chemist testify. Moreover, it "would be unduly inconvenient" to require chemists to testify in every contested drug case because, as previously described, they are not readily accessible because of their work load and location. These facts constitute one of the original bases for the exceptions to the hearsay rule, that of the practical unavailability of the witness.[15] In essence, Justice Harlan's test for determining the necessity for confrontation is that the testimony offered must be outcome determinative. Obviously, when the defense at trial does not request the presence of the chemist, his testimony should be deemed to be "of small utility" to the accused. Therefore, SP5 Santiago-Rivera's right to confrontation was not violated. This conclusion is supported by a number of federal cases.

In *United States v. Marshall*, 532 F.2d 1279 (9th Cir. 1976), the court admitted a laboratory report of analysis of certain drugs as past recollection recorded upon a showing that the chemist could not recall the particular analysis, holding that the exhibit did not violate the confrontation clause. Similarly, in *Robertson v. Cox*, 320 F. Supp 900 (D. Va. 1970), the admission in a rape prosecution of reports of the chief, medical examiner's office that indicated presence of seminal fluid in vaginal swabs did not violate the confrontation clause. In *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed. 2d 331, (1971), *rehearing denied*, 402 U.S. 906, 91 S.Ct. 1635, 29 L.Ed. 2d 131 (1971), a bill of lading was admitted to prove that the automobile in question was taken without authorization from the manufacturer's lot. The Court there held that "so long as regard is paid to the indespensible fundamental trustworthiness of the proffered record, the statute should of course be liberally interpreted." 435 F.2d at 802. Other federal courts have admitted bank collection slips, *Hanley v. United States*, 416 F.2d 1160 (5th Cir. 1969), *cert. denied* 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed. 2d 91 (1970); hotel records, *United States v. Leal*, 509 F.2d 122 (9th Cir. 1975); telephone operator records, *United States v. Haili*, 443 F.2d 1295 (9th Cir. 1971); and bank records, *United States v. Sand*, 541 F. 2d 1320 (9th Cir. 1976), as being not violative of the confrontation clause. A similar result is compelled in the instant case.

Finally, even assuming *arguendo* that *Henderson* and *Oates* represent the correct interpretation of FRE 803(6), the government position is that the Federal Rules of Evidence are not binding upon military trials. As previously noted, Article 36 of the Code give the

President discretion to establish the modes of proof at courts-martial. There is no indication whatsoever in the legislative history of the FRE that those Rules were intended to repeal the existing evidentiary rules for military tribunals which were lawfully promulgated by the President. The test for determining whether there is a repeal by implication was set forth by the Supreme Court in *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939):

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject the rule is to give effect to both if possible. *United States v. Bynen*, 11 Wall, 652, 657; *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest.' *Red Rock v. Henry*, 106 U.S. 596, 601, 602. It is not sufficent, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' *See also, Posados v. National City Bank*, 296 U.S. 497, 504.

In *United States v. Johnson*, 3 M.J. 143, 146 n. 3 (C.M.A. 1977), C.M.A. held that the Federal Rules of Evidence are applicable only where not otherwise prescribed in the *Manual*.[19] Because Paragraph 144 of the *Manual* fully covers the admissibility of business records at courts-martial, the *Oates* interpretation of Rule 803(6) is inapplicable.

RESOLUTION OF THE ISSUES.

Predicting the eventual decision in *United States v. Santiago-Rivera* is quite difficult because there is some merit in the positions taken by both the defense and the government. However, in the author's opinion, the appellant's argument is not convincing. The contention that lab reports do not fall within the scope of a recognized exception to the hearsay rule ignores most authority on the issue and, essentially, is illogical. A closer question is presented by the confronation issue. However, considering the current state of military law affording the accused the opportunity to cross-examine the analyst who prepared the lab report, the utilization of a balancing test which weighs the extremely limited utility of the witness' testimony vis-a-vis the accused against the practicalities involved results in the determination that the *Miller-Evans* rationale should not be disturbed. However, it is unlikely that C.M.A. will agree. When considerations of logic and precedent are put aside, a single dominant—and cynical—*caveat* remains: as a general rule, the Court of Military Appeals does not grant an accused's petition particularly on a specified issue, in order to laud the manner in which the military justice system functions. Assuming then, that a change in military law is imminent, what direction will it take?

These are two alternate positions which would be acceptable to C.M.A. First, it could obviously, adopt the defense argument in *Santiago-Rivera*. C.M.A. is generally regarded [20] as perhaps the most "liberal" American tribunal in terms of zealously protecting the rights, both real and imagined,[21] of the accused. When other appellate courts are split on a question of law, C.M.A. frequently adopts the doctrine most favorable to the accused; when the more recent decisions accept the defense position, the "bandwagon phenomenon" occurs because C.M.A. will enthusiastically reach a decision which is in accord with the recent trend.[22] Accordingly, it is entirely possible that C.M.A. will repudiate *Miller* and *Evans*.

The second possibility, and the one which the author considers to be the most viable, is to clarify one aspect of the *Evans-Miller* doctrine which has spawned much appellant litigation. Theoretically, in accordance with *Miller* and a recent line of cases regarding witness produc-

tion,[23] the government must produce the requested chemist as a witness or abate the proceedings. In practice, however, it frequently is difficult to determine if the defense's objection to the admission of the lab report should also be construed as a request for the presence of the analyst who prepared the report. For example, in a case recently argued by the author before the Army Court of Military Review,[24] the language employed by the civilian defense counsel in this regard was characterized by the defense during appeal as constituting a witness request. This type of difficulty occurs with some regularity.[25] A prophylactic inquiry by the trial judge could eliminate this type of case. Thus, by requiring the judge at contested drug trials in which lab reports are offered by the prosecution to specifically ask if the defense wants the analyst to be called, C.M.A. could perfect the *Evans-Miller* rule. Such a ruling would be consistent with Chief Judge Fletcher's interest in "judicializing"[26] the military justice system which has been manifested in the following recent opinions of that tribunal: *United States v. Green*, 1 M.J. 453 (C.M.A. 1976), imposing an affirmative obligation upon the military judge to question the accused and counsel regarding their understanding of the terms of the pretrial agreement during the guilty plea providence inquiry; *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977), requiring the trial judge to *sua sponte* issue corrective instructions when evidence of uncharged misconduct is adduced despite the absence of objection by the defense; *United States v. Graves*, 1 M.J. 50 (C.M.A. 1975), holding that the military judge must instruct the court members on issues raised by the evidence irrespective of the desires of the defense counsel, and observing that, "the trial judge is more than a mere referee, and as such he is required to assure that the accused receives a fair trial" (footnote omitted), *Id.* at 1 M.J. 53; *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976), requiring the trial judge to interrupt improper argument by the prosecution despite defense inaction; and *United States v. Morales*, 1 M.J. 87 (C.M.A. 1975) stating that the trial judge must *sua sponte* exclude prosecution evidence when no proper foundation for its admission exists. An analogous inquiry regarding lab reports would be an appropriate result in *Santiago-Rivera*, provided that it would be applied prospectively.

CONCLUSION.

Despite the strength of the government's case in *Santiago-Rivera*, it is almost certain that the decision of C.M.A. will result in at least some modification of the *Evans-Miller* doctrine. Under these circumstances, the prosecution in all contested drug cases tried before the *Santiago-Rivera* decision is announced should proceed cautiously in order to avoid obtaining a conviction which will be reversed on appeal. In addition to the obvious waste of time and money which would be caused by reversal, the dynamics of many narcotics cases are such that a retrial would be impossible because essential witnesses would be unavailable by reason of discharge or death, or impeachable because of subsequent conviction or receipt of a less than honorable discharge. Moreover, evidence is not always properly preserved between initial trial and retrial.

If possible, the prosecution should avoid creation of a lab report issue by encouraging guilty pleas, by entering into appropriate stipulations of fact or of expected testimony by the chemist, or by deposing the chemist. Because these measures require defense acquiescence, they frequently are not viable options. In other cases, whenever it is practical, the chemist should be called as a witness. Finally, the prosecution should develop a favorable trial record. This may be accomplished with correspondence introduced as appellate exhibits which advised the defense that the lab report will be offered and inquiring if the presence of the chemist is desired, or though direct inquiry regarding the defense desires by the military judge. When the judge fails to take any initiative of this type, it is appropriate for government counsel to request that he make an appropriate inquiry regarding the defense position in the matter. Hopefully, these measures will preserve those convictions obtained during the interim before the *Santiago-Rivera* decision is announced even if C.M.A. overturns

Miller and *Evans*. Such caution is mandated because C.M.A. usually does not apply its holdings prospectively when it reverses sound precedent.[27]

Notes

* Captain English is a former member of the Government Appellate Division. This article was prepared by him to satisfy the requirements for a course which is part of the LL.M. degree program at George Washington University.

[1] *See e.g., United States v. Bauder*, CM 435657 (A.C.M.R. 12 May 1977), *pet. pending* (Docket No. 34, 923) 28 September 1977. For a general discussion of the "trailer case" phenomenon, see English, *The Impact of Cost-Effectiveness Considerations Upon the Exercise of Prosecutorial Discretion*, THE ARMY LAWYER, Dec. 1977, at 26.

[2] Army Reg. No. 195-2, United States Army Criminal Investigation Laboratories, para. 6-5 *b*, (12 June 1975).

[3] CID Reg. No. 195-20, Laboratory Operations, para. 1-5, (1 June 1974).

[4] Entries 1, 8, and 18, Summary Reports of CID laboratories for the period 1 July through 31 July 1977, CID Form 49; CID Reg. No. 195-20, *supra*.

[5] *See generally*, 2 WHARTON, CRIMINAL EVIDENCE Section 265 (13th Ed. 1972); MCCORMICK, EVIDENCE Section 245 (2d Ed. 1972).

[6] *United States v. Wilson*, 1 M.J. 325 (C.M.A. 1976).

[7] *See, 30 AM. JUR. 2d Evidence* § 947.

[8] *See*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 138*c*[hereinafter cited as MCM, 1969]; 15 AM. JUR. POF §115 (Neutron Activation Analysis); 20 AM. JUR. POF §499 (Thin-Layer and Paper Chromatography).

[9] Federal Rules of Evidence, Pub. L. No. 93-595, Section 2(b), 88 Stat. 1949 (1975), [hereinafter cited as "FED. R. EVID." or "Federal Rules"].

[10] MCM, 1969, para. 144*c*, is as follows:

> Business entries. Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurence, or event, if made in the regular course of any business and if it was the regular course of that business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but these circumstances will not affect its admissibility. The term "business" as used with respect to business entries includes a business, profession, occupation, or calling of any kind.

[11] 28 U.S.C. Section 1732 (1970) is as follows:

> Record made in regular course of business; photographic copies.
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

[12] FED. R. EVID. 803 (6) is as follows:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[13] *See*, H.R. Rep. No. 650, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087-88; Conf. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7104.

[14] MCM, 1969, para. 144*d*.

[15] A laboratory report can also be admitted into evidence as an official record. MCM, 1969, para. 144*b*, defines an official record as follows:

b. *Official records.* A writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate, is admissible as evidence of the fact or event if it was made by any person within the scope of his official duties and those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

The analysis of a substance for the existance or non-existance of contraband "by chemical examination under laboratory conditions" has been held by C.M.A. to be a factual determination and not merely an opinion. *United States v. Evans, supra,* 21 C.M.A. at 582–83, 45 C.M.R. at 356. The chemist is required by regulation to make an "examination" of all physical evidence he receives which has not already undergone examination. Chapter 6, Army Reg. No. 195–2, United States Army Criminal Investigation Laboratories, para. 6–5 (23 Aug. 1974); and Chapter 3, Paragraph 3–6a, CIDR 195–20, Laboratory Operations (1 June 1974). The chemist is further required by regulation to record his factual determinations. Paragraph 3–6c, CIDR 195–20, *supra.* A laboratory report can thus be admitted into evidence as an official record when it is accompanied by an authentication certificate. Faust v. United States, 163 U.S. 452, 16 S. Ct. 1112, 41 L.Ed. 224 (1896); United States v. Masusock, 1 C.M.A. 32, 1 C.M.R. 32 (1951). In *Santiago-Rivera,* the documents were authenticated by the custodian of the records of the United States Army Criminal Investigation Laboratory CONUS (Prosecution Exhibits 2, 7, and 10) in accordance with MCM, 1969, para. 143*b* (2) (a).

[16] *United States v. Evans, supra,* 21 C.M.R. at 600, 45 C.M.R. at 356.

[17] United States v. Ware, 247 F.2d 698, 699 (7th Cir. 1957); Thomas v. Hogan, 308 F.2d 355, 360 (4th Cir. 1962); *see also,* United States v. Frattini, 501 F.2d 1234, 1236 (2nd Cir. 1974).

[18] 5 WIGMORE, EVIDENCE Section 1521 (Chadburn Rev. 1974).

[19] *See also,* MCM, 1969, para. 137.

[20] *See e.g.,* Schapp, *Justice for G.I. Joe,* JURIS DOCTOR Mar. 1978; Cook, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System,* 76 MIL. L. REV. 43 (1977).

[21] For example, in United States v. Mosely and Sweisford, 1 M.J. 350 (C.M.A. 1976), C.M.A. rules that it was improper for the prosecution to argue that deterrence of others should be considered in imposing sentence. The author is aware of no other American jurisdiction in which this practice is considered to be improper. *See,* United States v. Foss, 501 F.2d 522, 527 (1st Cir. 1974) and the authority cited therein.

[22] *See e.g.,* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (adopting the American Law Institute sanity standard despite the divergence of the Federal Circuits on this issue).

[23] United States v. Carpenter, 3 M.J. 384 (C.M.A. 1976); United States v. Willis, 3 M.J. 94 (C.M.A. 1977); United States v. Jouan, 3 M.J. 136 (C.M.A. 1977).

[24] *United States v. Burrell,* CM 435123, oral argument entertained 21 November 1977, is currently pending before Panel 2 of the A.C.M.R.

[25] *Compare,* United States v. Niederkorn, 50 C.M.R. 341, 342 (A.C.M.R. 1975), *with* United States v. Johnson, 3 M.J. 772 (A.C.M.R. 1977).

[26] *See generally* the commentaries cited at n. 20 above.

[27] For a general discussion of the failure of C.M.A. to adhere to the doctrine of *stare decisis et non quieta movere, see* English, *The Impact of Cost-Effectiveness Considerations Upon the Exercise of Prosecutorial Discretion,* THE ARMY LAWYER, Dec. 1977, at 25.

Editor's Note: Chief Judge Fletcher briefly discussed "the stringent tracing required as the fundation for admission of real evidence in the military trial" in United States v. Nault, 4 M.J. 318, 320, n.7 (C.M.A. 1978).

Criminal Law Section

Criminal Law Division, OTJAG

1. Certificate to Authenticate DA Form 4187. Paragraph 5–10*b*(2), AR 680–1, requires the unit commander reporting duty status changes of service members to furnish and authenticate copy 3, DA Form 4187. The AR takes no account of Consolidation of Administration at Battalion Level (CABL) units, whose records are maintained at battalion level. CABL is the administrative scheme of the future. In a recent application for relief under the provisions of Article 69, U.C.M.J., which involved a CABL unit, authentication of copy 3, DA Form

4187, by the battalion adjutant instead of accused's company commander was challenged. Copy 3 had been admitted into evidence at trial to prove an AWOL. The trial counsel's dilemma was to have the battalion adjutant authenticate the DA Form and disregard AR 680-1, or to comply with the AR by company commander authentication even though the form was maintained at battalion level. He chose the former.

HQDA Message 161650 Feb 78, SUBJ: Certified Copy of DA Form 4187 (Personnel Action), terminated the dilemma by instructing unit commanders or designated representatives to furnish trial counsel with the original number 3 copy, DA Form 4187, together with an attached certificate derived from the format below:

CERTIFICATE

(Date certificate prepared)

I certify that I am the ____ (commanding officer or designated representative (in case of battalion Personnel and Administration Center)) ____ of the organization listed on the attached form, and the official custodian of copy no. 3 of the Personnel Action Sheet, DA Form 4187, of the organization listed thereon, and that the attached is a true and complete duplicate original (carbon copy) of the DA Form 4187 of said organization submitted at ____ (installation) ____, relating to ____ (grade, name as shown in section 1, DA Form 4187, and SSN) ____.

Signature
Typed name, grade, and
branch of service

Both trial and defense counsel should become familiar with the contents of the above referenced HQDA message.

2. Execution of Waiver Forms by Defense Counsel for Purposes of Complying with *United States v. Booker*. The Judge Advocate General recently rendered an opinion concerning execution by defense counsel of waiver forms intended to be implemented by staff judge advocate offices for purposes of showing satisfaction of the requirements laid down by the United States Court of Military Appeals in *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Two questions were presented: (1) Does requiring a judge advocate to execute the waiver forms reciting he gave the requisite counselling infringe upon the attorney-client relationship, thereby entailing ethical impropriety? (2) May a judge advocate legally be ordered to execute the forms?

The first question does not involve a matter of professional responsibility, as it does not fall within Disciplinary Rule 4-101, ABA Code of Professional Responsibility, which applies to preservation of "confidences" and "secrets." *United States v. Booker, supra*, as well as the sample waiver forms proposed in DA message 111230Z Nov 77, Subject: USCMA Decision, US v. Booker, concern only "core advice" that a lawyer has a duty to give a client. No confidences or secrets are revealed either as a result of observing *Booker* or the execution of the proposed forms.

Privileged communication, itself, is a question of substantive law and not of ethics. When a judge advocate consults with a client in the *Booker* situation, he or she is required to give certain advice. While the attorney can go beyond what is required and discuss related matters which do fall under the privilege, he or she must advise as to the *Booker* rights. In doing so, a judge advocate is both providing a service to the client and performing a prescribed military duty. A lawyer has no right to omit this advice when counseling a client and no right to tell the government it cannot query him or her concerning whether the required advice was given. Failure to give the advice could involve dereliction in the performance of duties.

What appears to be disturbing to some judge advocates is memorializing the advice they give by their executing the proposed waiver forms. As a result, they are attempting to create a right to refuse on the grounds that, by signing, they may be perfecting evidence against their clients for potential use in future proceedings. However, defense counsel "perfect" the record

of trial when they respond to the judge's *care* inquiry after their client enters a plea of guilty at trial. Further, defense counsel cannot object to references in the trial record to their presence in court as potentially being detrimental to their clients. Nothing in the ABA Code, the law of privilege, or substantive law generally precludes an attorney from being required to memorialize that he or she performed a prescribed duty. There is no legal support for the theory that counsel can do this on the basis of possible future disadvantage to the client.

As to the second question, there is no legal objection to a supervisor's giving a judge advocate an order to sign the proposed forms. A judge advocate detailed for the *Booker* purpose has a legal duty to give the advice and is without a legal basis to refuse. This approach should be avoided, if at all possible, as it has high potential of bringing about confrontation and creating a poor image of military justice. Judge advocates should understand that, even if an order is not given as a result of a refusal to sign, other adverse consequences can follow (*e.g.*, relief for dereliction, admonition or reprimand, and a reflection of willful failure on their OER's). Whatever approach is taken, supervisors should use common sense and discuss the matter thoroughly with any judge advocate who initially refuses to sign.

3. Reference to AR 190-47 in Post-Trial Review. Despite previous guidance, trial records continue to be received indicating that convening authorities have not been apprised by staff judge advocates of the provisions of paragraph 6–22*b*, AR 190–47, 15 December 1975, in appropriate cases. Paragraph 6–22b, AR 190–47, provides that any sentence imposed on an enlisted person that exceeds forfeiture of two-thirds pay per month for six months should be remitted by the convening authority unless the sentence includes, and the convening authority approves, a punitive discharge or confinement unsuspended for the period of such forfeitures. The policy stated in paragraph 6–22*b* has been recognized in military law and is based upon sound reasons. To require an enlisted man to perform full duty in a nonpromotable status at reduced pay over an extended period of time would reduce his incentive to perform well and lessen the probability of his rehabilitation. *See United States v. Stroud*, 44 C.M.R. 480 (A.C.M.R. 1971); *United States v. Bumgarner*, 43 C.M.R. 559 (A.C.M.R. 1970).

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Civil Service System Reorganization

On March 2, President Carter submitted to Congress draft proposals for reorganizing and improving the efficiency of the Civil Service System and the federal labor-management relations program. (124 Congressional Record H. 1661 (H. Doc. No. 95–299)). The final proposals will become law unless acted upon by Congress within sixty days of formal submission. Although Congressional modification is considered likely (*see* GERR 754:6, April 10, 1978), labor counselors should monitor the progress of the President's reorganization plans in anticipation of future developments at the installation level.

The major proposals are briefly described below.

1. Civil Service Reform. The Civil Service Commission would be replaced by two new administrative offices, an Office of Personnel Management (OPM) and a Merit Protection Board. The Director of the OPM would administer examinations, training, benefits policy and other personnel programs which are currently the responsibility of the Civil Service Commission. The Merit Protection Board, comprised of three bi-partisan members appointed to seven year terms, would act to preserve merit principles in federal employment policy.

A Special Counsel to the Board would investigate and prosecute merit abuse in hiring, advancement or disciplinary actions.

2. Civilian Employee Pay System.

a. Senior Executive Service. Pay raises for and removal of GS grades 16 and above would be largely controlled by agency heads. Incentive awards would replace automatic pay increases.

b. Incentive Pay. GS grades 13–15 would also lose automatic pay increases. Only the top fifty percent of these grades would receive the incentive pay awards, as determined by the responsible supervisors.

3. Faster Resolution of Adverse Actions. A more expeditious system for settling disciplinary cases would streamline agency grievance review procedures. Witness subpoena power would be added for both management and any affected employees. EEO complaints would remain separate from grievance procedures.

4. Reorganization of the Labor-Management Relations Program for Federal Employees. The changes would probably occur as part of a separate legislative package designed to make federal labor relations more comparable to the private sector, particularly in the area of collective bargaining. A Federal Labor Relations Authority would combine most of the existing functions of the Federal Labor Relations Council and the Assistant Secretary of Labor. Unfair labor practices would be investigated and prosecuted by a Special Counsel, in much the same fashion as the NLRB functions in the private sector.

5. Speedier Filling of Civil Service Positions, Through Delegation of Hiring Power to Executive Departments and Agencies.

6. Restrictions on Veterans Preferences.

a. Limiting the five point preference on career examinations to a ten year period after discharge.

b. A "rule of seven" that would expand from three to seven the number of applicants who must be interviewed and considered for most positions.

c. Elimination of any preference for retired field grade officers. Hiring preference for lesser ranking retired military personnel would be limited to three years.

d. Eliminating the Veterans preference after three years of federal employment and replacing it with five years of seniority on the retention register, for reduction in force purposes.

The Judge Advocate General's Opinions

1. (Military Installations, Regulations) **Installation Commanders Have Discretionary Authority To Grant Or Deny Use Of Government Quarters For Party-Plan Sales.** DAJA-AL 1977/5995, 22 Nov. 1977. In response to an inquiry from The Adjutant General Center concerning the validity of certain restriction in a post regulation, The Judge Advocate General advised that commanders have discretionary authority to grant or deny the use of government quarters for the purpose of conducting party-plan sales, *e.g.*, jewelry, houseware, or cosmetic parties. However, a restriction in the same regulation which prohibited authorization of solicitation privileges to firms which conduct business through party-plan sales was legally objectionable. Although a firm normally may conduct business on a party-plan sales basis, there is no legal basis for denying solicitation privileges to such a firm provided the firm conducts its solicitation on-post in a manner not prohibited by a local regulation. Such denial would be a restriction of competition in violation of paragraph 2–1*a*, AR 210–7. The same regulation also limited the number of agents authorized to represent any one commercial company to three. Because the revision was more restrictive than AR 210–7, paragraph 2–1*a*, of that regulation requires review and confirmation by The Adjutant General Center before such provision is legally enforceable.

2. (Military Installations, Miscellaneous) **Installation Commanders Have The Authority To Promulgate Rules To Preserve The Private Nature Of Private Religious Services.** DAJA-AL 1977/6255, 11 Jan. 1978. The Judge Advocate General recently rendered an opinion on the authority of installation commanders to promulgate rules to preserve the private nature of private religious services, *e.g.*, marriages, baptisms and funerals. The Judge Advocate General stated that installation commanders have authority to formulate reasonable standards governing the use of facilities on his installations, including the post chapel. As Army Regulation 165–20 provides that chapels may be utilized for private religious services, the installation commander may promulgate rules to preserve the private nature of such services, and such rules would constitute a proper exercise of the commander's authority.

Moreover, as a private religious service is of a personal nature where attendance ordinarily is limited to persons having a special interest in the ceremony, The Judge Advocate General expressed the view that a commander may deny use of the chapel to personnel, who are otherwise authorized access to the facility, during the period such private services are conducted. Such private services should occupy the chapel for relatively little time and, therefore, will not unduly restrict the chapels availability for general use.

3. (Nonappropriated Fund Instrumentalities, Operational Principles) **Club Card Drawings Are Lotteries And Prohibited Unless Officially Approved By The Department of The Army.** DAJA-AL 1977/6337, 23 Jan. 1978. The Judge Advocate General was asked to comment on a proposal to amend AR 230-60 to authorize club card drawings as a method of encouraging members to attend Army clubs. The proposal provided for a drawing each night from a container holding all of the names of the club members. To win the member had to be present in the club. The minimum prize was to be $5.00, which increased $5.00 a night when the member, whose name was drawn, was not present. On the 31st consecutive day without a winner the club would hold a drawing until a winner was present.

Defining lottery as an activity consisting of a "consideration," a "chance," and a "prize," it was the opinion of The Judge Advocate General that the proposed club drawing was a lottery. The "prize" being the money, the "chance" being the drawing, and the "consideration" being the time the member must expend in the club to be present to win.

The Judge Advocate General then pointed out that para. 2–7, AR 600–50, and paragraph XIII, DoD Directive 5500.7, prohibit all lotteries not officially approved by the Department of the Army, and that traditionally Army approval has been granted only for fund-raising lotteries and games of chance shown to be especially beneficial to the Department of the Army. He concluded that whether a justifiable basis existed to designate the club card drawings as beneficial fund-raising activities was a matter of policy to be decided prior to amending AR 230–60.

Reserve Affairs Section

Reserve Affairs Department, TJAGSA

1. USAR Outstanding and Superior Unit Awards.

AR 140–24, dated 15 April 1978, outlines eligibility criteria as well as procedures for the nomination and selection of U.S. Army Reserve (USAR) units for the following annual awards:

a. The USAR Superior Unit Certificate awarded by the Secretary of the Army.

b. The Reserve Officers Association of the United States Outstanding USAR Unit Awards given by the Reserve Officers Association (ROA).

c. The Reserve Officers Association Outstanding USAR Flight Facility Award given by the ROA.

d. The Phillip A. Connelly Award for excellence in Army food service, Reserve Component, awarded by the U.S. Army Troop Support Agency.

Many JAG reserve units would qualify for the awards at *a* and *b* above. JAG reserve unit commanders should investigate the possibilities of having their units nominated for such awards.

CLE News

1. Minnesota. The Minnesota Board of Continuing Legal Education has approved a request for up to 5.5 hours CLE credit for attendance at the Workshop portions of the Judge Advocate Reserve Conference and Workshop held 7–9 September 1977 in Charlottesville.

2. North Dakota. The complete rules of the Supreme Court of North Dakota for Continuing Professional Education of the members of the Bar may be found in 54 N. Dakota L. Rev. 131 (1977). The Guidelines for Approved Course Work issued by the Commission for Continuing Legal Education can be obtained from the State Bar Association of North Dakota, P.O. Box 2136, Bismarck, ND 58501. Resident CLE Courses at TJAGSA satisfy the North Dakota requirements. Section 4 of the Guidelines indicate that up to one-third of the annual requirement of 15 hours may be satisified by self-study including correspondence course work provided by an approved sponsoring organization. At present only North Dakota has indicated the acceptability of self-study in meeting the mandatory CLE requirements.

3. Washington. Field Defense Services (FDS) is pleased to announce that the Washington State Board of Continuing Legal Education has approved their 1978 Defense Counsel Seminars for up to 7.5 hours of CLE credit.

Attorneys who are planning to use the seminars to meet their 1978 Washington State CLE requirements should contact FDS (Autovon 289-1390) so they can certify your attendance at one of the seminars.

In addition to the acceptance of resident TJAGSA CLE courses the Washington State Board of Continuing Legal Education recently approved the Reserve Component Technical Training (On-Site) session conducted by TJAGSA faculty in Seattle, Washington on 4 February 1978 for up to 7 hours CLE credit.

4. Wisconsin. The Board of Attorney's Professional Competence has extended general program approval to the CLE courses conducted by TJAGSA with the exception of Law Office Management and Management for Military Lawyers. Wisconsin attorneys may claim CLE credit for all actual classroom hours attended in TJAGSA academic programs on the required certification to the Board.

5. Wyoming. The Supreme Court of Wyoming adopted Mandatory CLE Rules in December, 1977, effective 1 January 1978. During the first year each attorney must complete a minimum of 10 hours of accredited CLE. Thereafter a minimum of 15 hours per year must be completed. Hours in excess of the required minimum may be carried over for credit in either of the two years next following. An annual report is required. There are special provisions for law teachers and lecturers, for inactive members, and for obtaining equivalent credit. Wyoming is allowing credit for attendance at CLE courses offered at TJAGSA.

6. TJAGSA CLE Course Prerequisites. Four officers were recently scheduled for the Defense Trial Advocacy Course *who did not meet the course prerequisites.* One case was discovered prior to the course and the quota was cancelled. The others came to light during the opening session of the course.

Many of our courses are directed at specific limited audiences and all are restricted as to

size because of space, faculty or method of instruction limitations. There are waiting lists for virtually every course. Sending an officer to a course simply because the quota and funds are available may well deprive someone on the waiting list of a course which will be immediately relevant and which is specifically designed to support that person's current duty assignment.

SJAs are requested to check carefully the prerequisites for each course as published in the *Annual Bulletin* and *The Army Lawyer* to insure eligibility prior to filling quotas. Requests for waiver of prerequisites should be submitted to the Director of Academics.

7. 9th Advanced Procurement Attorney's Course. The theme for the 9th Advanced Procurement Attorneys' Course, scheduled for 8 through 12 January 1979, is "Contract Formation with Emphasis on Socieoeconomic Policies and Other Legislation".

A limited number (25) of texts used in the 8th Advanced Procurement Attorney's Course on Construction Contracting are available. If a copy is desired, requests should be made to the Procurement Law Division, The Judge Advocate General's School, Charlottesville, Virginia 22901. The text will be mailed on a first come, first served basis to those requesting copies.

8. NCOES Advanced Course. There will be two offerings of the NCOES Advanced Course (71D/E Track) at the USAIA, Ft. Benjamin Harrison, Indiana, on the following dates:

25 May–1 June 1979
19–26 October 1979.

The course will no longer be included in the calendar of TJAGSA course offerings as the USAIA has taken on full resonsibility for managing this course. TJAGSA instructors will still participate.

9. New Tapes Available from Television Operations, TJAGSA.

PROCUREMENT LAW:

Number — Title
Date — Synopsis
Length

74th PROCUREMENT ATTORNEYS' COURSE (27 Feb–10 Mar 78)

JA–114–1 — INTRODUCTION AND GENERAL PRINCIPLES, PART I
Feb 78 — Speaker: Lieutenant Colonel Robert M. Nutt, Chief, Procurement Law Division, TJAGSA.
36:00

JA–114–2 — INTRODUCTION AND GENERAL PRINCIPLES, PART II
Feb 78 — A continuation of JA–114–1.
43:00

JA–114–3 — INTRODUCTION AND GENERAL PRINCIPLES, PART III
Feb 78 — A continuation of JA–114–1, and JA–114–2.

PROCUREMENT LAW:

Number — Title
Date — Synopsis
Length

JA–114–4 — PROCUREMENT RESEARCH
Feb 78 — Speaker: Captain(P) Percival D. Park, Editor, Military Law Review, TJAGSA.
30:00

JA-114-5
Feb 78
48:00
FUNDING AND FUND LIMITATIONS, PART I
Speaker: Major Gary L. Hopkins, Procurement Law Division, TJAGSA.

JA-114-6
Feb 78
44:00
FUNDING AND FUND LIMITATIONS, PART II
A continuation of JA-114-5.

JA-114-7
Feb 78
53:00
FUNDING AND FUND LIMITATIONS, PART III
A continuation of JA-114-5 and JA-114-6.

JA-114-8
Feb 78
37:00
TYPES OF CONTRACTS, PART I
Speaker: Captain Glenn E. Monroe, Procurement Law Division, TJAGSA.

JA-114-9
Feb 78
42:00
TYPES OF CONTRACTS, PART II
A continuation of JA-114-8.

JA-114-10
Feb 78
43:00
SELECTED LABOR STANDARDS
Speaker: Major Gary L. Hopkins, Procurement Law Division, TJAGSA.

JA-114-11
Feb 78
47:00
SELECTED LABOR PROBLEMS (SERVICE CONTRACTS), PART I
Speaker: Captain(P) Riggs L. Wilks, Procurement Law Division, TJAGSA.

JA-114-12
Feb 78
46:00
SELECTED LABOR PROBLEMS (SERVICE CONTRACTS), PART II
A continuation of JA-114-11.

JA-114-13
Feb 78
42:00
MINOR CONSTRUCTION (OPTIONAL FOR NON-DOD PERSONNEL)
Speaker: Captain Glenn E. Monroe, Procurement Law Division, TJAGSA.

JA-114-14
Mar 78
39:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART I
Speaker: Major Gary L. Hopkins, Procurement Law Division, TJAGSA.

JA-114-15
Mar 78
55:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART II
A continuation of JA-114-14.

JA-114-16
Mar 78
46:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART III
A continuation of JA-114-14 and JA-114-15.

JA-114-17
Mar 78
45:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART IV
A continuation of JA-114-14, JA-114-15, and JA-114-16.

JA-114-18
Mar 78
53:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART V
A continuation of JA-114-14 through JA-114-17.

JA-114-19
Mar 78
17:00
PROCUREMENT METHODS: FORMAL ADVERTISING, PART VI
A continuation of JA-114-14 through JA-114-18.

JA-114-20
Mar 78
43:00
PROCUREMENT METHODS: NEGOTIATIONS, PART I
Speaker: Captain Theodore F. M. Cathey, Procurement Law Division, TJAGSA.

JA-114-21
Mar 78
46:00
PROCUREMENT METHODS: NEGOTIATIONS, PART II
A continuation of JA-114-20.

JA-114-22
Mar 78
48:00
PROCUREMENT METHODS: NEGOTIATIONS, PART III
A continuation of JA-114-20 and JA-114-21.

JA-114-23
Mar 78
47:00
PROCUREMENT METHODS: NEGOTIATIONS, PART IV
A continuation of JA-114-20, JA-114-21 and JA-114-22.

JA-114-24
Mar 78
44:00
REMEDIES OF UNSUCCESSFUL OFFERORS, PART I
Speaker: Captain (P) Riggs L. Wilks, Procurement Law Division, TJAGSA.

JA-114-25
Mar 78
41:00
REMEDIES OF UNSUCCESSFUL OFFERORS, PART II
A continuation of JA-114-24.

JA-114-26
Mar 78
43:00
PROCUREMENT ATTORNEY RESPONSIBILITIES, PART I
Speaker: Major Gary L. Hopkins, Procurement Law Division, TJAGSA.

JA-114-27
Mar 78
45:00
PROCUREMENT ATTORNEY RESPONSIBILITIES, PART II
A continuation of JA-114-26.

JA-114-28
Mar 78
21:00
CONTRACT MODIFICATIONS, PART I
Speaker: Captain Glenn E. Monroe, Procurement Law Division, TJAGSA.

JA-114-29
Mar 78
49:00
CONTRACT MODIFICATIONS, PART II
A continuation of JA-114-28.

JA-114-30
Mar 78
44:00
CONTRACT MODIFICATIONS, PART III
A continuation of JA-114-28 and JA-114-29.

JA-114-31
Mar 78
35:00
CONTRACT MODIFICATIONS, PART IV
A continuation of JA-114-18, JA-114-29 and JA-114-30.

JA-114-32
Mar 78
60:00
SOCIOECONOMIC POLICIES (OPTIONAL)
Speaker: Captain Theodore F. M. Cathey, Procurement Law Division, TJAGSA.

JA-114-33
Mar 78
45:00
CONTRACT TERMINATIONS, PART I
Speaker: Captain Theodore F. M. Cathey, Procurement Law Division, TJAGSA.

JA-114-34
Mar 78
44:00
CONTRACT TERMINATIONS, PART II
A continuation of JA-114-33.

JA-114-35
Mar 78
47:00
CONTRACT TERMINATIONS, PART III
A continuation of JA-114-33 and JA-114-34.

JA-114-36
Mar 78
45:00
CONTRACT TERMINATIONS, PART IV
A continuation of JA-114-33 through JA-114-35.

JA-114-37
Mar 78
48:00
INSPECTION, ACCEPTANCE AND WARRANTIES, PART I
Speaker: Captain(P) Riggs L. Wilks, Procurement Law Division, TJAGSA.

JA-114-38
Mar 78
51:00
INSPECTION, ACCEPTANCE AND WARRANTIES, PART II
A continuation of JA-114-37.

JA-114-39
Mar 78
43:00
INSPECTION, ACCEPTANCE AND WARRANTIES, PART III
A continuation of JA-114-37 and JA-114-38.

JA-114-40
Mar 78
31:00
INSPECTION, ACCEPTANCE AND WARRANTIES, PART IV
A continuation of JA-114-37 through JA-114-39.

JA-114-41
Mar 78
49:00
CONTRACT COSTS (OPTIONAL), PART I
Speaker: Captain Glenn E. Monroe, Procurement Law Division, TJAGSA.

JA-114-42
Mar 78
39:00
CONTRACT COSTS (OPTIONAL), PART II
A continuation of JA-114-41.

JA-114-43
Mar 78
48:00
DISPUTES AND REMEDIES, PART I
Speaker: Lieutenant Colonel Robert M. Nutt, Chief, Procurement Law Division, TJAGSA.

JA-114-44
Mar 78
45:00
DISPUTES AND REMEDIES, PART II
A continuation of JA-114-43.

JA-114-45
Mar 78
50:00
DISPUTES AND REMEDIES, PART III
A continuation of JA-114-43 and JA-114-44.

JA-114-46
Mar 78
46:00
GOVERNMENT INFORMATION PRACTICES, PART I
Speaker: Major Thomas M. Strassburg, Administrative and Civil Law Division, TJAGSA.

JA-114-47 Mar 78 48:00 — GOVERNMENT INFORMATION PRACTICES, PART II
A continuation of JA-114-46.

JA-114-48 Mar 78 29:00 — DEFENSE OF GOVERNMENT CONTRACT CLAIMS, PART I
Speaker: Lieutenant Colonel Robert M. Nutt, Chief, Procurement Law Division, TJAGSA.

JA-114-49 Mar 78 48:00 — DEFENSE OF GOVERNMENT CONTRACT CLAIMS, PART II
A continuation of JA-114-48.

JA-114-50 Mar 78 51:00 — NONAPPROPRIATED FUND PROCUREMENT (OPTIONAL)
Speaker: Captain Theodore F. M. Cathey, Procurement Law Division, TJAGSA.

JA-114-51 Mar 78 44:00 — CONTRACTING OUT—COMMERCIAL/INDUSTRIAL TYPE ACTIVITIES (CITA), (OPTIONAL)
Speaker: Lieutenant Colonel Robert M. Nutt, Chief, Procurement Law Division, TJAGSA.

ADMINISTRATIVE AND CIVIL LAW:

17TH FEDERAL LABOR RELATIONS COURSE (3-7 Apr 78)

JA-249-1 Apr 78 51:00 — EMPLOYMENT IN THE CIVIL SERVICE, PART I
Speaker: Captain Joyce E. Plaut, Administrative and Civil Law Division, TJAGSA.

JA-249-2 Apr 78 52:00 — EMPLOYMENT IN THE CIVIL SERVICE, PART II
A continuation of JA-249-1.

JA-249-3 Apr 78 50:00 — EMPLOYMENT IN THE CIVIL SERVICE, PART III
A continuation of JA-249-1 and JA-249-2.

JA-249-4 Apr 78 47:00 — FUNDAMENTALS OF FEDERAL LABOR-MANAGEMENT RELATIONS, PART I
Speaker: Major Dennis F. Coupe, Administrative and Civil Law Division, TJAGSA.

JA-249-5 Apr 78 35:00 — FUNDAMENTALS OF FEDERAL LABOR-MANAGEMENT RELATIONS, PART II
A continuation of JA-249-4.

JA-249-6 Apr 78 50:00 — EMPLOYEE DISCIPLINE, PART I
Speaker: Captain Joyce E. Plaut, Administrative and Civil Law Division, TJAGSA.

JA-249-7
Apr 78
42:00
EMPLOYEE DISCIPLINE, PART II
A continuation of JA-249-6.

JA-249-8
Apr 78
49:00
THE REPRESENTATION PROCESS, PART I
Speaker: Major Dennis F. Coupe, Administrative and Civil Law Division, TJAGSA.

JA-249-9
Apr 78
40:00
THE REPRESENTATION PROCESS, PART II
A continuation of JA-249-8.

JA-249-10
Apr 78
47:00
THE STATUTORY BASIS FOR ADVERSE ACTIONS, PART I
Speaker: Captain Joyce E. Plaut, Administrative and Civil Law Division, TJAGSA.

JA-249-11
Apr 78
33:00
THE STATUTORY BASIS FOR ADVERSE ACTIONS, PART II
A continuation of JA-249-10.

JA-249-12
Apr 78
48:00
SCOPE OF BARGAINING, PART I
Speaker: Major Dennis F. Coupe, Administrative and Civil Law Division, TJAGSA.

JA-249-13
Apr 78
54:00
SCOPE OF BARGAINING, PART II
A continuation of JA-249-12.

JA-249-14
Apr 78
42:00
EQUAL EMPLOYMENT OPPORTUNITY, PART I
Speaker: Captain Joyce E. Plaut, Administrative and Civil Law Division, TJAGSA.

JA-249-15
Apr 78
36:00
EQUAL EMPLOYMENT OPPORTUNITY, PART II
A continuation of JA-249-14.

JA-249-16
Apr 78
48:00
THE UNION VIEWPOINT OF THE FEDERAL LABOR-MANAGEMENT RELATIONS PROGRAM PART I
Guest Speaker: Mr. Robert J. Canavan, Chief Counsel, National Association of Government Employees.

JA-249-17
Apr 78
46:00
THE UNION VIEWPOINT OF THE FEDERAL LABOR-MANAGEMENT RELATIONS PROGRAM, PART II
A continuation of JA-249-16.

JA-249-18
Apr 78
50:00
UNFAIR LABOR PRACTICES
Speaker: Major Dennis F. Coupe, Administrative and Civil Law Division, TJAGSA.

JA-249-19 GRIEVANCE PROCEDURES AND ARBITRATION
Apr 78 Speaker: Major Dennis F. Coupe, Administrative and Civil Law Division,
43:00 TJAGSA.

JA-249-20 FEDERAL CONTRACTOR-EMPLOYEE RELATIONS, PART I
Apr 78 Speaker: Captain(P) Riggs L. Wilks, Procurement Law Division, TJAGSA.
40:00

JA-249-21 FEDERAL CONTRACTOR-EMPLOYEE RELATIONS, PART II
Apr 78 A continuation of JA-249-20.
43:00

JA-249-22 FEDERAL CONTRACTOR-EMPLOYEE RELATIONS, PART III
Apr 78 A continuation of JA-249-20 and JA-249-21.
43:00

JA-249-23 THE ROLE AND FUTURE OF THE CIVIL SERVICE COMMISSION,
Apr 78 PART I
60:00 Guest Speaker: Dr. Thomas P. Murphy, Director, Federal Executive Institute, Charlottesville, Virginia.

JA-249-24 THE ROLE AND FUTURE OF THE CIVIL SERVICE COMMISSION,
Apr 78 PART II
39:00 A continuation of JA-249-23.

CRIMINAL LAW:

JA-331 TRIAL ADVOCACY: ART OR CRAFT?
Mar 78 Colonel Wayne E. Alley, Chief, Criminal Law Division, Office of The Judge
58:00 Advocate General, discusses the craft and ethics of trial advocacy, including the selection of one's targets of persuasion and basic methodology in the preparation and trial of a court-martial case.

JA-332 AN INTERVIEW WITH JUDGE JOHN S. McINERNY
Mar 78 In a comprehensive interview, Judge John S. McInerny, Superior Court Judge
42:00 for the State of California in Santa Clara County, offers candid and thought-provoking comments on the subject of sentencing of convicted felons.

JA-333 MILITARY CORRECTIONS
Apr 78 An in-depth view of what happens to Army prisoners sentenced to confinement
49:00 at hard labor, showing who goes where for how long. The rehabilitation process is dramatically depicted in a movie of the United States Disciplinary Barracks and a filmstrip of the United States Army Retraining Brigade, which are supplemented by lecture that contrasts their modern approaches to those of history's most infamous prisons.

INTERNATIONAL LAW:

JA-424 DIRECTIONS IN THE DEVELOPMENT OF THE LAW OF WAR, PART I
Apr 78 Major General Walter D. Reed, Judge Advocate General of the Air Force,
54:00 Professor Telford Taylor, War Crimes Prosecutor at Nuremberg after World War II, and Professor W. T. Mallison, Chief of the International and

Comparative Law Division at George Washington University Law School, speak on trends in the development of the law of armed conflict with emphasis on the Geneva Protocols, the law of air warfare, protections for civilians, occupation, war crimes and enforcement.

JA–425
Apr 78
56:00

DIRECTIONS IN THE DEVELOPMENT OF THE LAW OF WAR, PART II
A continuation of JA–424.

ACIL (COMMAND & MANAGEMENT):

JA–530
1972
41:00

COMRADE SOLDIER (AFIF 227)
Program follows a Soviet youth from day of conscription notice through his first weeks in the Soviet Army. (Color)

JA–531
1972
17:00

THE MEXICAN-AMERICAN SPEAKS: HERITAGE IN BRONZE (AFIF 246)
Program traces the history of Spanish heritage Americans up through their aspiration of the 1970's. (Color)

JA–532
1975
36:00

THE ASIAN AMERICAN (AFIF 263)
LTC Edwin Nakasone, USAR, Professor of Asian History, discusses the history and problems of Asian Americans. (Color)

JA–533
1975
25:00

BOURBON IN SURBURBIA (AFIF 271)
A dramatization which focuses on a middle class housewife and her unacceptance that she is an alcoholic. (Color)

JA–534–1
1976
60:00

I'LL QUITE TOMORROW, PARTS I AND II (AFIF 284)
A dramatization with narrative which traces the drinking habits of an alcoholic from the first drink as a teenager through confrontation by family and friends that he is an alcoholic to successful rehabilitation. (Color)

JA–534–2
1976
28:00

I'LL QUIT TOMORROW, PART III (AFIF 284)
A continuation of JA–534–1.

JA–535
1977
44:00

GUIDELINES (AFIF 291)
Father Martin presents his eight guidelines for involvement in helping people with drinking problems. (Color)

JA–536
1976
24:00

ALCOHOLISM: THE BOTTOM LINE (AFIF 292)
A dramatization in alcoholism and the rationales exhibited by alcoholics to justify their problems. (Color)

JA–537
1976
34:00

ESPIONAGE: TARGET—US ARMY (MF 30-5918)
Dramatization showing how foreign intelligence agents manipulate and coerce US Army personnel into supplying classified information. (Color)

JA–538
1976
25:00

MODERN BATTLE (TF 21-4925)
Explains the concept of the modern battlefield emphasizing the lethality and mobility of modern weapons. (Color)

JA–539
1976
43:00

LEADERSHIP SERIES—PROBLEMS OF COMMAND IN MALE/FEMALE UNITS (TF 22–4952 through TF 22–4963)
Twelve situations dealing with problems of command in male/female units. (Color)

JA-540 INFORMATION SECURITY (TF 30-6021)
1977 Dramatization concerning the loss of classified information and how it could have
36:00 occurred. Indicates the most common breaches of information security. (Color)

Video tapes listed below have been determined obsolete and released from the October 1977 Video and Audio Tape Catalog:

ADMINISTRATIVE AND CIVIL LAW

Delete entire JA-243 Series: 15TH FEDERAL RELATIONS COURSE (4-8 Apr 77) on pages 17, 18 and 19.

10. TJAGSA CLE Courses.

June 12-16: 41st Senior Officer Legal Orientation Course (5F-F1).

July 24-August 4: 76th Procurement Attorneys' Course (5F-F10).

August 7-11: 8th Law Office Management Course (7A-713A).

August 7-18: 2d Military Justice II Course (5F-F31).

August 21-25: 42d Senior Officer Legal Orientation Course (5F-F1).

August 28-31: 75th Fiscal Law Course (5F-F12).

September 18-29: 77th Procurement Attorney's Course (5F-F10).

October 2-6: 9th Law of War Workshop (5F-F42).

October 10-13: Judge Advocate General's Conference and CLE Seminars.

October 16-December 15: 88th Judge Advocate Officer Basic (5-27-C20).

October 16-20: 5th Defense Trial Advocacy.

October 23-November 3: 78th Procurement Attorneys' (5F-F10).

November 6-8: 2d Criminal Law New Developments (5F-F35).

November 13-16: 8th Fiscal Law (5F-F12).

November 27-December 1: 43d Senior Officer Legal Orientation (5F-F1).

December 4-5: 2d Procurement Law Workshop (5F-F15).

December 7-9: JAG Reserve Conference and Workshop.

December 11-14: 6th Military Administrative Law Developments (5F-F25).

January 8-12: 9th Procurement Attorneys' Advanced (5F-F11).

January 8-12: 10th Law of War Workshop (5F-F42).

January 15-17: 5th Allowability of Contract Costs (5F-F13).

January 15-19: 6th Defense Trial Advocacy (5F-F34).

January 22-26: 44th Senior Officer Legal Orientation (5F-F1).

January 29-March 30: 89th Judge Advocate Officer Basic (5-27-C20).

January 29-February 2: 18th Federal Labor Relations (5F-F22).

February 5-8: 8th Environmental Law (5F-F27).

February 12-16: 5th Criminal Trial Advocacy (5F-F32).

February 21-March 2: Military Lawyer's Assistant (512-71D20/50).

March 5-16: 79th Procurement Attorneys' (5F-F10).

March 5-8: 45th Senior Officer Legal Orientation (War College) (5F-F1).

March 19-23: 11th Law of War Workshop (5F-F42).

March 26-28: 3d Government Information Practices (5F-F28).

April 2-6: 46th Senior Officer Legal Orientation (5F-F1).

April 9-12: 9th Fiscal Law (5F-F12).

April 9-12: 2d Litigation (5F-F29).

April 17-19: 3d Claims (5F-F26).

April 23-27: 9th Staff Judge Advocate Orientation (5F-F52).

April 23-May 4: 80th Procurement Attorneys' (5F-F10).

May 7-10: 6th Legal Assistance (5F-F23).

May 14-16: 3d Negotiations (5F-F14).

May 21-June 8: 18th Military Judge (5F-F33).

May 30-June 1: Legal Aspects of Terrorism.*

June 11-15: 47th Senior Officer Legal Orientation (5F-F1).

June 18–29: JAGSO (CM Trial).

June 21–23: Military Law Institute Seminar.

July 9–13 (Proc) and July 16–20 (Int. Law): JAOGC/CGSC (Phase VI Int. Law, Procurement).

July 9–20: 2d Military Administrative Law (5F–F20).

July 16–August 3: 19th Military Judge (5F–F33).

July 23–August 3: 81st Procurement Attorneys' (5F–F10).

August 6–October 5: 90th Judge Advocate Officer Basic (5–27–C20).

August 13–17: 48th Senior Officer Legal Orientation (5F–F1).

August 20–May 24, 1980: 28th Judge Advocate Officer Graduate (5–27–C22).

August 27–21: 9th Law Office Management (7A–713A).

September 17–21: 12th Law of War Workshop (5F–F42).

September 24–28: 49th Senior Officer Legal Orientation (5F–F1).

*Tentative.

11. TJAGSA Course Prerequisites and Substantive Content. A complete list of TJAGSA Course Prerequisites and Substantive Content is published in the March 1978 issue of *The Army Lawyer* as item eight in the "CLE News" section.

12. Civilian Sponsored CLE Courses.

JUNE

1–2: FBA, Midwestern Regional Conference [seminar on Federal Trial Practice], Hyatt Regency Chicago, Downtown Chicago, IL.

5–6: FBA, Product Safety Letter Conference on Product Safety, Twin Bridges Marriott Hotel, Arlington, VA.

5–7: Federal Publications, Small Purchasing, Washington, DC. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

5–9: Armed Forces Institue of Pathology, 18th Annual Lectures, Sheraton-Silver Spring, MD. Contact: The Director, Armed Forces Institute of Pathology, ATTN: AFIP–EDE, Washington, DC 20306.

6–8: LEI, Paralegal Workshop, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254–3843.

7–9: Federal Publications, Changes in Government Contracts, Los Angeles, CA. Contact: Miss J. K. Van Wycks, Seminar Divison, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

7–9: Federal Publications, Contracting for Services, Las Vegas, NV. Contact Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

8–9: Federal Publications, Procurement for Secretaries, Washington, DC. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $400.

9–10: FBA, Equal Employment and Collective Bargaining Conference, The Mayflower Hotel, Washington, DC.

11–16: ALI–ABA—Villanova Univ. School of Law, Federal Rules of Evidence: A Clinical Study of Recent Developments, Villanova, PA. Contact: Donald M. Maclay, Director, Courses of Study, ALI–ABA Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. Phone: (215) 387–3000.

11–23: NCSJ, the Judge and The Trial—Graduate. Contact: National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone: (702) 784–6747. Cost: $545.

11–7 July: NCSJ, General Jurisdiction—First Summer—General. Contact: National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone: (702) 784–6747. Cost: $945.

12–23: NCDA, Executive Prosecutor Course, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: (713) 749–1571.

14–16: LEI, Institute for New Government Attorneys, Kings Point, NY. Contact: Legal Education Institute–TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254–3483.

18–30: NCCDLPD, Trial Practice Institutes, Houston, TX. Contact: Registrar, National College of Criminal Defense Lawyers and Public Defenders, College of Law, Univ. of Houston, 4800 Calhoun, Houston, TX 77004. Phone: (713) 749–2283. Cost: $375.

19–20: PLI, Occupational Safety and Health Law, Hyatt Regency Hotel, Atlanta, GA. Contact: Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765–5700. Cost: $175. Course Handbook Only: $20.

19–21: George Washington Univ.-Federal Publications, Cost Accounting Standards, Vail, CO. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

19–21: Univ. of Baltimore School of Law—Federal Publications, Practical Negotiation of Government contracts, Marriott Inn, Berkely, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006.Phone: (202) 337–7000. Cost: $475.

19–21: George Washington Univ.-Federal Publications, Cost Accounting Standards, Vail, CO. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

20–21: IPLT, Evidence and Trial Preparation, New York, NY. Contact: Kathryn Mann, The Institute for Paralegal Training, 235 S. 17th St., Philadelphia, PA. Phone: (215) 732-6999. Cost: $225.

25–7 July: NCSJ, Sentencing/Criminal Law-Graduate. Contact: National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone: (702) 784-6747. Cost: $545.

27–30: Northwestern Univ., 21st Annual Short Course for Defense Lawyers in Criminal Cases, Chicago, IL. Contact: Miss Marie D. Christiansen, Administrator, Northwestern Univ. School of Law, 357 E. Chicago Ave., Chicago, IL 60611. Phone: (312) 649-8467. Cost: $250.

26–30: George Washington Univ.-Federal Publication, The Practice of Equal Employment, San Diego, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $575.

JULY

5–7: LEI, Institute for Legal Counsel, TJAGSA, Charlottesville, VA. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254–3483.

9–28: NCDA, Career Prosecutor Course, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: (713) 749–1571.

10–14: Federal Publications, Government Construction Contracting, Las Vegas, NV. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $575.

11–13: LEI, Seminar for Attorney-Managers, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (302) 254-3483.

12–14: PLI, Workshop for the Lawyer's Assistant: Paraprofessional and Secretary [Estate Planning and Administration or Litigation], Biltmore Hotel, New York, NY. Contact: Nancy Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765–5700. Cost: $125.

17–21: Univ. of Richmond School of Law, Summer Program in England for Practicing Lawyers [Legal History; Law of the European Economic Community; International Tax; Courtoom Use of Forensic Evidence; Administrative Law: Practice and Procedure], Queen's College, Cambridge Univ., England. Contact: Director, Summer Program for Practicing Lawyers at Cambridge, Univ. of Richmond School of Law, Univ. of Richmond, VA 23173. Cost: $375.

17–21: Federal Publications, Civilian Agency Procurement, Washington, D.C. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $575.

17–29: Harvard Law School, 10th Program of Instruction for Lawyers, Cambridge, MA. [The Program consists of 31 courses and four afternoon colloquia.] Contact: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

18–20: LEI, Legal Research for Paralegals Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254–3483.

24–28: Univ. of San Francisco School of Law—Federal Publications, Concentrated Course in Government Contracts, Tropicana Hotel, Las Vegas, NV. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $575.

26–27: LEI, Preparation of Litigation Reports Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254–3483.

31–2 Aug.: Federal Publications, Construction Contract Modifications, Washington, DC. Contact: Miss J. K. Van Wycks, Seminar Divison, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337–7000. Cost: $475.

JAGC Personnel Section

PP&TO, OTJAG

1. RA Promotions.

LIEUTENANT COLONEL

Earl M. LaPlant — 6 Mar 78

MAJOR

John E. Kirchner — 15 Mar 78

CAPTAIN

Richard B. Arrotta — 24 Apr 78

2. AUS Promotions.

MAJOR

Philip Chiminello — 6 Mar 78
Vahan J. Moushegian — 9 Mar 78
John M. Renfrow — 2 Mar 78

3. Reassignments of Chief and Senior Legal Clerks and Court Reporters.

Name	*From*	*To*
	E-9	
Morey, Carlton G.	Korea	Ft. Jackson, SC
Underwood, Kenneth D.	Ft. Knox, KY	Korea
Weaver, James D.	Germany	Ft. Knox, KY
Wooden, William K.	Canal Zone	Ft. Dix, NJ
	E-8	
Davis, Thomas G. (P)	Ft. Eustis, VA	Ft. Sill, OK
Piar, Mathias J.	Selfridge, MI	Ft. Ord, CA
	E-7	
Barbee, Tobias Y.	Ft. Campbell, KY	NSS, Newport, RI
Barnes, Gerald	Belgium	Ft. Hood, TX
Boatwright, Charles H. (P)	Alaska	Ft. Hood, TX
Caballero, Edward, Jr.	Ft. Riley, KS	Korea
Cunningham, Lawrence	Ft. Devens, MA	Korea
Dawley, Jerry D.	Ft. Carson, CO	Korea
Fields, William T.	Alaska	Ft. Knox, KY
Finch, Thomas	Hawaii	Ft. Eustis, VA
Gilliland, John D.	Germany	Ft. McCellan, AL
Gray, Jerry L.	Korea	Ft. Huachuca, AZ
Henry, Donald L.	Ft. McClellan, AL	Germany
Jacobi, Gerd E.	Germany	Ft. Hood, TX
Knodik, Thomas	Ft. Bliss, TX	Germany
Kydd, Lawrence L.	Ft. Carson, CO	Korea
Manning, Harlan E.	Ft. Riley, KS	Taiwan
Meents, Terry L.	Ft. Dix, NJ	Korea
Midkiff, Kenneth	Alaska	Ft. Hood, TX
Morris, Michael L.	Ft. Bliss, TX	Korea

Name	*From*	*To*
Ogden, Harold E. (P)	Germany	USMA, West Point, NY
Prieto, Fernando	Germany	Ft. Gordon, GA
Swart, James D.	Korea	Ft. Knox, KY
Vickers, Charles H.	Ft. Leonard Wood, MO	Germany
Wagner, Gene E.	Ft. Bliss, TX	Korea
White, John	Germany	Ft. Campbell, KY
Wood, Billy D.	Ft. Sill, OK	Korea

Current Materials of Interest

***The Advocate* Tenth Anniversary Issue.**

THE ADVOCATE began its tenth year of publication with volume 10 Number 1, January–February 1978. The Tenth Anniversary issue contained:

Major General Wilton B. Persons, Jr., *Providing Effective Defense Service*, at 4.

Chief Judge Albert P. Fletcher, Jr., *Instructions—An Under Utilized Opportunity for Advocacy*, at 7.

Brigadier General Hugh J. Clausen, *Improving the System—An Important Role for the Appellate Defense Lawyer*, at 11.

Brigadier General Victor A. DeFiori, *The Defense Counsel in USAREUR*, at 14.

Colonel Wayne E. Alley, *Trial Defense Counsel Happily Remembered*, at 19.

Colonel William S. Fulton, Jr., The Advocate *and the Training of Advocates*, at 22.

Colonel Robert B. Clarke, *Defense Appellate Division and the Trial Defense Counsel: The Defense Team*, at 26.

Major Kenneth J. Leonardi, *Observations of a Senior Defense Counsel*, at 30.

Captain John O. Ellis Jr., *Observations of a Trial Defense Counsel*, at 37.

***The Advocate* distribution.**

Army Trial Defense Counsel: Beginning with Vol. 10 No. 1, one copy of each issue of THE ADVOCATE should be distributed to each Army trial defense counsel, in additon to one copy for each defense library. Contact: Captain Nicholas P. Retson, Managing Editor, THE ADVOCATE, Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS–DA), Nassif Building, Falls Church, Virginia 22041.

Air Force Defense Counsel: THE ADVOCATE delivers 207 copies of each issue to the Air Force for distribution to individual Air Force defense counsel. Contact: SSGT Hudson, Executive Services Section, Office of The Judge Advocate General, HQ, United States Air Force, Washington, DC 20314. AUTOVON 693–5820.

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Articles.

LCDR Edward H. Bonekemper III, U.S. Coast Guard, *Ethical Issues in Military Legal Assistance*, 64 A.V.A.J. 469 (1978).

Note, *The Federal "Government in the Sunshine Act": A Public Access Compromise*, 29 U. FLA. L. REV. 881 (1977).

Federal Employees' Benefits Revision.

Chapter I of Title 20 C.F.R. has been revised. Title 20 deals with employees' benefits.

Chapter I is titled "Office of Workers' Compensation Programs, Department of Labor: Employees' Benefits: Claims for Compensation Under the Federal Employees' Compensation Act." The revised Chapter I of Title 20 C.F.R. was printed in the Federal Register, Vol. 40 No. 32 Part III, Feb. 14, 1975, at 1.

Current Military Justice Library.

4 M.J. No. 10
4 M.J. No. 11
4 M.J. No. 12

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Brigadier General, United States Army
The Adjutant General